Office - Supreme Court, U. S.
FILED
JUL 9 1952
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

LIBRARY
SUPREME COURT, U.S.

No. 187

WILLIAM E. BODE, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.,

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

HUGH J. GRAHAM,
GEORGE HOFFMANN,
Of Counsel.

SCOTT W. LUCAS,
CHARLES A. THOMAS,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
State statute the validity of which is involved	2
Dates of decree and application for appeal	3
Nature of case and rulings below	4
The operation on non-residents	5
Citation of authority	9
Conclusion	12
Appendix "A"—An Act to Amend Sections 9, 11a, and 20 and to Repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the "Motor Vehicle Law," approved June 30, 1919 as amended	13
Appendix "B"—Opinion of the Supreme Court of Illinois in the case of *William E. Bode, et al.* v. *Edward J. Barrett, Secretary of State, et al.*	20

Table of Cases Cited

Bode v. *Barrett, et al.*, Supreme Court of Illinois, March 20, 1952, Docket No. 32290	20
Krebs v. *Thompson*, 387 Ill. 471	5, 9, 11
New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63, 73 L. ed. 184	5, 9, 12
Schuylkill v. *Pennsylvania*, 296 U.S. 113, 80 L. ed. 91	10

Statutes and Authorities Cited

Act to Amend Sections 9, 11a, and 20 and to Repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, and 9l of the "Motor Vehicle Law," approved June 30, 1919 as amended (Laws of Illinois 1951, Page 1147)	2
Constitution of the United States:	
Article 1, Section 8	4, 5, 9
Article 1, Section 10	4, 9
Fourteenth Amendment, Section 1	5, 6

	Page
Illinois Motor Vehicle Law (Illinois Revised Statutes 1951, Chapter 95½, Sections 9 and 10a)	2
Illinois Revised Statutes 1951, Chapter 102, Paragraphs 11-16	4
Illinois State Constitution	2
Reciprocal Guide for Motor Vehicles, Illinois 1951	7
Rules of the United States Supreme Court, Rule 12	1*
United States Code Annotated, Title 28, Section 1257(2) (June 25, 1948 c. 646, Section 1, 62 Stat. 929)	2, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 187

WILLIAM E. BODE, ET AL.,

Plaintiffs-appellees,

vs.

EDWARD J. BARRETT, as Secretary of State of the State of Illinois, BENJAMIN O. COOPER, as Auditor of Public Accounts of the State of Illinois and WILLIAM STRATTON, as State Treasurer of the State of Illinois.

Defendants-appellants.

JURISDICTIONAL STATEMENT IN SUPPORT OF PETITION OF WILLIAM E. BODE, ET AL FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

To The HONORABLE SHERMAN MINTON,

Justice of the Supreme Court of the United States.

The following statement in writing is made in accordance with Rule 12 of the Rules of the Supreme Court of the United States:

1. Reference is hereby made to subsection (2) of Section 1257 of Title 28 of the Judicial Code of the United States

to sustain the right of petitioners to appeal from the final decree of the State of Illinois the pertinent portions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows: * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity. * * *"
>
> (June 25, 1948 c 646, Sec. 1, 62 Stat. 929)
>
> Supplement III to United States Code, 1946 ed., G.P.O. 1950, Title 28, sec. 1257 subsec. 2.

2. Reference is made to "An Act to Amend Sections 9, 11a, and 20 and to repeal sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, and 9l of the 'Motor Vehicle Law', approved June 30, 1919 as amended" (Laws of Illinois 1951, p. 1147) which Act is claimed to be unconstitutional and void in its entirety.

The Act here summarized is set forth verbatim as Appendix A to this jurisdictional statement.

The Illinois Motor Vehicle Law prior to the enactment of the statute in question provided flat taxes for motor vehicles carrying goods and carrying more than seven passengers and also provided an optional mileage tax based on the amount of use of the highways. The highest flat tax under the former law was $420.00. (Ill. Rev. Stat. 1951, ch. 95½ Secs. 9 and 10a).

The statute here attacked (Laws of Illinois 1951 p. 1147) imposed a greatly increased flat tax, the highest tax being $1134.00 for 1952 and 1953 and $1588.00 for 1954 and thereafter. This statute also repealed the mileage option which formerly existed. This statute also changed certain

classifications and omitted certain classes of vehicles (non-freight carrying vehicles, and 4 wheel freight carrying vehicles from 30,000 to 36,000 lbs. are omitted altogether and may have been in part omitted from the former act.) A new class of two axle buses operating entirely within a single municipality or a single municipality and municipalities contiguous thereto "or a close radius thereof" was subjected to a substantially lower tax. New classes providing different taxes were added where the classes are by the definition indistinguishable (Secs. 9 (i-3) and 9 (l-4)). The Act, as did the former Act creates an agricultural exemption. The Act exempts vehicles from states with whom the state of Illinois had reciprocity and the Act authorizes agreements concerning reciprocity. The Act provides that semi-trailers shall be considered one vehicle with the tractor unit except that additional semi-trailers shall be licensed at $5.00 per annum. Taxes are based on weight of vehicle and maximum load. (It is claimed there is no definition of maximum load). There is no factor provided for relating the tax to the amount of use of the highway.

3. The final decree of the Supreme Court of Illinois sought to be reviewed sustaining the validity of the statute in question was entered on the 20th day of March A. D. 1952 and the Supreme Court of Illinois denied rehearing of said cause on the 23rd day of May A. D. 1952.

The application for appeal is presented to Honorable Sherman Minton Justice of the Supreme Court of the United States on the 5th day of June A. D. 1952.

4. The plaintiffs-appellees filed a complaint in the Circuit Court of Sangamon County, Illinois as citizens and taxpayers of the State of Illinois on behalf of themselves and all other taxpayers of the State pursuant to the statute authorizing suits in equity by taxpayers in proper cases to restrain the disbursement of public moneys by officers of the

state (Ill. Rev. Stat. 1951, ch. 102, Pars. 11-16) to enjoin the state officers who are the appellants named in this cause from expending public funds in administration or enforcement of the statute hereinbefore summarized and a copy of which is attached hereto as Appendix "A". The allegations of the complaint charged that said statute was unconstitutional and void, being specifically alleged to be in violation of several provisions of the Constitution of the State of Illinois and of the following provisions of the Constitution of the United States: Article 1, Section 8; Article 1, Section 10; and Amendment XIV, Section 1 (Rec. 9-23).

The appellants filed an answer to the complaint of the plaintiffs-appellees, and evidence was introduced by each group of litigants.

The Circuit Court of Sangamon County, Illinois, in finding the Act unconstitutional on each of the counts alleged (Rec. 444) entered a decree on November 20, 1951 in which it recited that it had jurisdiction of the parties and of the subject matter that all citizens and taxpayers of the state are bound by and entitled to the benefits of this decree that the allegations of the complaint were true and correct, that said statute is unconstitutional, void and of no legal force and effect, and that the appellants should be enjoined and restrained as prayed for in the complaint (Rec. 63-66).

Upon appeal to the Supreme Court of the State of Illinois, the judgment of the Circuit Court of Sangamon County, Illinois was reversed, and said decision of the Supreme Court of the State of Illinois was in favor of the validity and constitutionality of the statute. (Opinion of the Supreme Court of Illinois is attached as Appendix B.)

The repugnancy of the Statute of the State of Illinois (Laws of Illinois 1951 p. 1147) to the Constitution of the United States was drawn in question by the complaint filed

in the Circuit Court of Sangamon County on September 12, 1951. The sole purpose of this complaint was to attack this statute on the ground of its being repugnant to the Constitution of the State of Illinois and the Constitution of the United States. Illinois Revised Statutes 1951, ch. 102, pars. 11-16 permit such a suit by any taxpayer. In such suit any taxpayer may question the repugnancy of any statute requiring the expenditure of State funds to the Constitution of the State of Illinois or the Constitution of the United States without regard to whether the taxpayer is otherwise affected by the Act than as a taxpayer of the State of Illinois. Any provision of the Act which might result in expenditure of funds to administer an unconstitutional law may be attacked in such suit by any taxpayer. (*Krebs* v. *Thompson*, 387 Ill. 471 and *William E. Bode* vs. *Edward J. Barrett et al* in the Supreme Court of Illinois March 20, 1952 docket No. 32290 herewith set forth as Appendix B pp. 22 and 23.)

The repugnancy of this statute to the Constitution of the United States is raised in the complaint par. 6 (d) wherein quotations are made from Sections 8 and 10 of Article I of the Constitution of the United States (Rec. 13 and 14).

The repugnancy of this Statute to the Constitution of the United States is also raised in the complaint, par. 6 (c) wherein quotations are made from the XIVth Amendment to the Constitution of the United States (Rec. 14).

Paragraph 12 of the Complaint is as follows:

"12. Section 20 of the Act set forth in paragraph IV violates Article 1, Section 8 of the constitution of the United States and Amendment XIV Section 1 of the Constitution of the United States:

"(a) The operation of the tax on 'non-residents' whose states require Illinois residents to pay taxes results in a cumulative burden on interstate commerce

and a discrimination between carriers in interstate commerce.

"(b) The operation of the tax on 'resident' owners discriminates against 'residents' in favor of 'non-residents' in interstate commerce where the State of the 'non-resident' exempts Illinois residents from its taxes.

"(c) Unless exemption of non-resident owners offers the alternative of a mileage weight basis or other use basis, it will discriminate against parties engaged in interstate commerce depending upon where such parties do business.

"(d) Section 20 of the Act discriminates against foreign corporations, partnership or individuals 'doing business in the State' in favor of those not 'doing business in this State' and discriminates in favor of foreign corporations doing business in the State and against residents in interstate commerce and otherwise.

"(e) Section 20 of the Act creates a cumulative burden on interstate commerce as to many carriers from states where no reciprocity is allowed.

"(f) Section 20 enables the Secretary of State of Illinois to arbitrarily impose a burden on interstate commerce as to classes of vehicles and types of commerce."

Paragraph 7 of the complaint specifies a number of respects in which the Act is arbitrary, vague, indefinite, improperly classified discriminatory, oppressive in violation of the XIVth Amendment to the Constitution of the United States (Rec. 14-16).

Paragraph 8 of the complaint sets forth improper delegations of power which also mount to arbitrary legislation in violation of the XIVth Amendment to the Constitution of the United States while this paragraph does not itself refer to the Constitution of the United States the subject matter is covered under the general charges of paragraph 6. (Rec. 14 and Rec. 16-18).

Paragraph 11 of the complaint (Rec. 20-21) also illustrates other defects in classification.

The evidence taken consisted of testimony as to the effect of the Act on certain private carriers and local carriers, of a truck expert, and of officials of the State of Illinois (Rec. 77-292).

Many exhibits showing mileages of different types of carriers were introduced (Rec. 295 to 427-8).

A summary of agreements of the State of Illinois and other states concerning reciprocity was introduced by an official document "Reciprocal guide for Motor Vehicles, Illinois 1951—plaintiffs Ex. 58, Rec. 349).

Records of certain carriers who do business in the State of Illinois and interstate business were introduced. See table Rec. 313, 316 and 319.

The opinion of the Supreme Court of Illinois in the decree here appealed from summarizes the issues presented on pages 3 and 4 of the opinion as follows:

> "The complaint filed by the plaintiffs directly challenged the constitutionality of the amendatory act in question in numerous respects which may be summarized as follows:
>
> "I. By ignoring the difference in use of the highways by the various established classes of vehicles, viz: line haul and other common carriers, local carriers, private carriers, contract carriers and specialized carriers, said act imposes a burdensome graduated flat tax which,
>
> "a. Bears no fair relation to the privilege of using the highways and is in violation of sections 1 and 2 of Article IX of the constitution.
>
> "b. Has no consistent theme of classification, contrary to sections 1 and 2 of article IX and to section 22 of article IV of the constitution.
>
> "c. Thereby is discriminatory as between classes of users and confiscatory as to some, in violation of section 2 of article II of the Illinois constitution, and the four-

teenth amendment to the constitution of the United States.

"II. The amendment violates article III and section 2 of article II of the constitution in the following respects:

"a. It creates a favored class of two-axle busses operating in a municipality or municipalities or 'close radius thereof' without defining said terms.

"b. It bases the tax on 'maximum load' while giving no standard for determining the same.

"c. It creates confusion and indefinite classifications and omits vehicles authorized by law to use the road.

"d. It authorizes the Secretary of State to enter into reciprocal agreements with responsible officers of other States, which is in violation of section 8 of article I of the constitution of the United States.

"e. It creates an indefinite agricultural exclusion.

"f. It creates a confusion as to trucks of school districts or imposes a heavy tax thereon, which is in violation of sections 3 and 10 of article IX of the Illinois constitution.

"III. The heavy flat tax imposed discriminates against Illinois residents and nonresidents from non-reciprocal States in favor of nonresidents from reciprocal States, and imposes an undue burden on interstate commerce in violation of section 8 of article I of the constitution of the United States, and is arbitrary and discriminatory in violation of section 2 of article II of the Illinois constitution and the fourteenth amendment to the constitution of the United States."

The Operation On Non-Residents

The entire opinion of the Supreme Court of Illinois discussing at length the interstate commerce questions involved makes the fact that the repugnancy of the Statute to the Constitution of the United States is drawn in question obvious (Appendix B.).

Additionally the defendants questioned the right of plaintiffs to raise certain aspects of this situation. The Court said on pp. 22 and 23 of its opinion:

> "Defendants contend that only nonresidents from States that do not have reciprocity can challenge the act on the ground that it discriminates against them and that none of plaintiffs are members of this class. This contention is unsound. Where, as here, the suit is brought by a taxpayer under the statute governing injunctive proceedings to restrain the disbursement of public moneys, (Ill. Rev. Stat. 1951, Chap. 102, pars. 11-16,) we have held that the validity of a statute may be challenged by a taxpayer even though he is not, and does not claim to be, subject to the provisions of the act or to be affected by its provisions except as a taxpayer. *Krebs* v. *Thompson*, 387 Ill. 471."

Additionally, the briefs of plaintiffs and petitions for rehearing raised all of the questions of repugnancy to the Constitution of the United States here raised.

Citation of Authority

The Supreme Court of Illinois in this case (*William E. Pode* v. *Barrett* No. 32290 opinion filed March 20, 1952, appendix B hereof, pp. 3 and 4 and pp. 22 and 23) states that plaintiffs have drawn in question the repugnancy of this amendment to the Motor Vehicle Law (Laws of Illinois 1951 p. 1147), to Sections 8 and 10 of Article I of the Constitution of the United States and the fourteenth Amendment to the Constitution of the United States.

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the

state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."
New York ex rel Bryant v. *Zimmerman* (1928)
278 U.S. 63, on 67, 73 L. Ed. 184 on 187 Col. 1.

"Whether the point was in fact raised in the court below is itself a federal question and we are bound to examine the record to resolve it."
Schuylkill v. *Pennsylvania.*
296 U.S. 113 on 121,
80 L. Ed. 91 on 98 Col. 1.

5. The grounds on which it is believed that the questions raised are substantial are:

(a) The statute enjoined by the Circuit Court in the decree which was reversed by the Supreme Court of Illinois (Laws of Illinois 1951, p. 1147) in a decision upholding validity of the statute involves over $20,000,000 in revenue annually to the State of Illinois.

(b) The plaintiffs are all taxpayers of the State of Illinois by representation. See Supreme Court opinion Appendix B hereof and decree of the Circuit Court (Rec. 64).

(c) Owners of over 347,000 trucks and busses and over 58,000 trailers are affected in the license fees assessed (Rec. 436, Defendant's Exhibit 5, Col. 6).

(d) Interstate carriers both private and for hire in number unknown but including all who use the highways of the State of Illinois as much as one mile in a year (illustration Rec. 313-316 and 319-320) are vitally affected.

(e) Carriers in interstate commerce from 17 non-reciprocal states who do any business thru any part of the state of Illinois and all Illinois truckers and carriers who compete with carriers from 31 reciprocal states who do any business in Illinois are involved in

substantial and arbitrary differences in cost of carrying on interstate commerce.

(f) All truck owners resident in and doing any business in Illinois or thru any part of Illinois are affected by the arbitrary character of the law in question. (XIVth Amendment to the Constitution of the United States).

(g) The violation of the clause in Section 10, Article I of the Constitution of the United States forbidding compacts and agreements without the consent of Congress by authorization and execution of reciprocal agreements (Plaintiffs' Exhibit 58, rec. 349) results in creation of trading areas and trade barriers and infringement of the authority of Congress in reference to an economic policy as old as the Constitution itself.

(h) The law (Laws of Illinois 1951, p. 1147) being arbitrary results in arbitrary disarrangement and confusion in interstate commerce and is a burden thereon.

(i) The cumulative effect of taxes imposed by non-reciprocal states constitutes a substantial burden on interstate commerce because there is no method provided for establishing a fair relation between the use of the highways, the license charge therefor and the interstate commerce carried on by the individual trucker or class of truckers.

6. Appendix B is a copy of the opinion of the Supreme Court of Illinois in the case here appealed, *William E. Bode et al* v. *Edward J. Barrett et al*, No. 32290.

7. The stage of the proceedings in which the questions were raised in the Circuit Court of Sangamon County being the court of first instance was the complaint (rec. 9-24). The manner of raising was a prayer for injunction against spending public funds to enforce the unconstitutional Act. The federal questions were specifically stated in the complaint.

8. The method of raising the federal questions was by obtaining an injunction against spending public funds to

enforce the Act and by appeal by the defendants to the Supreme Court of Illinois which reversed the decree of the Circuit Court and passed upon the federal questions in its opinion. (Appendix B) and stated therein the right of plaintiffs to raise the questions under Chap. 102, pars. 11-16 Ill. Rev. Stat. 1951 as interpreted in *Krebs* v. *Thompson*, 387 Ill. 471 (Appendix B).

Conclusion

There could hardly be a more obvious conformance to the provisions of Title 28 Sec. 1257 (2) in the matter of a state statute being drawn into question on the ground of repugnancy to the Constitution of the United States nor a more substantial question than that here involved.

Respectfully submitted, SCOTT W. LUCAS, CHARLES A. THOMAS, *Attorneys for Petitioners*. Address: 231 S. LaSalle St., Chicago, Illinois.

HUGH J. GRAHAM, JR., Springfield, Illinois; GEORGE HOFFMAN, Springfield, Illinois, *Of Counsel*.

APPENDIX "A"

An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the "Motor Vehicle Law", approved June 30, 1919, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 9, 11a and 20 of the "Motor Vehicle Law", approved June 30, 1919, as amended, are amended to read as follows:

Sec. 9. All owners of vehicles of the second division as described in Section 2 of this Act, which are designed or equipped or used for carrying freight, goods, wares or merchandise, and all owners of vehicles of said first division which have been remodeled and are being used for such purposes, and all owners of self-propelled vehicles operated as tractors to the weights of which are added the gross weights of the heaviest semi-trailers with their loads used with such tractors, and all owners of vehicles of said second division which are used for carrying more than seven persons, shall pay to the Secretary of State for each calendar year from and after January 1, 1936, for the use of the public highways of this State, a license fee of five dollars ($5.00) for each such vehicle.

Every application for registration of a truck subject to regulation under the provisions of "An Act in relation to the regulation of the operations of trucks designed or used for the transportation of property", approved July 25, 1939, as amended, shall, be accompanied by proof that a valid and unrevoked certificate of safety has been issued for each such truck. No certificate of registration or license plates shall be issued by the Secretary of State to the owner of any such truck unless such proof accompanies such application.

Every owner of a motor vehicle subject to the provisions of this section shall pay to the Secretary of State for each

calendar year from and after January 1, 1952, for the use of the public highways a tax at the following rates, to-wit:

(a) Vehicles having a gross weight of three thousand (3000) pounds and less, including the weight of the vehicle and maximum load, $5.00.

(b) Vehicles having a gross weight of more than three thousand (3000) pounds and not more than eight thousand (8000) pounds, including the weight of the vehicle and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(c) Vehicles having a gross weight of more than eight thousand (8000) pounds and not more than ten thousand (10,000) pounds, including the weight of the vehicle and maximum load, $41.00 until January 1, 1954, and thereafter $58.00.

(d) Vehicles having a gross weight of more than ten thousand (10,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, $62.00 until January 1, 1954, and thereafter $87.00.

(e) Vehicles having a gross weight of more than twelve thousand (12,000) pounds and not more than fourteen thousand (14,000) pounds, including the weight of the vehicle and maximum load, $81.00 until January 1, 1954, and thereafter $114.00.

(f) Vehicles having a gross weight of more than fourteen thousand (14,000) pounds and not more than sixteen thousand (16,000) pounds, including the weight of the vehicle and maximum load, $101.00 until January 1, 1954, and thereafter $141.00.

(g) Vehicles having a gross weight of more than sixteen thousand (16,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the vehicle and maximum load, $154.00 until January 1, 1954, and thereafter $216.00.

(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twen-

ty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.

(h-1) Four wheel vehicles designed and used for the carrying of more than seven passengers and equipped with balloon tires and hydraulic shock absorbers and having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $389.00 until January 1, 1954, and thereafter $545.00.

(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00.

Six or more wheeled vehicles having a gross weight of more than thirty thousand (30,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $579.00 until January 1, 1954, and thereafter $810.00.

Six or more wheeled vehicles having a gross weight of over thirty-six thousand (36,000) pounds, but not exceeding forty-one thousand (41,000) pounds, including the weight of the vehicle and maximum load, $635.00 until January 1, 1954, and thereafter $890.00.

(i-1) Six or more wheeled vehicles having a gross weight of more than forty-one thousand (41,000) pounds, but not exceeding forty-five thousand (45,000) pounds, including the weight of the vehicle and maximum load, $700.00 until January 1, 1954, and thereafter $980.00.

(i-2) Eight or more wheeled vehicles having a gross weight of more than forty-five thousand (45,000) pounds, but not exceeding fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $784.00 until January 1, 1954, and thereafter $1098.00.

(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.

(i-4) Ten or more wheeled vehicles having a gross weight of more than fifty thousand (50,000) pounds, but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00.

(j) A self-propelled vehicle operated as a tractor and one semi-trailer shall be considered as one vehicle in computing the above license fees. A semi-trailer used with any device for converting it to a trailer or attached to a leading trailer or semi-trailer shall be licensed as a trailer.

(k) Each additional semi-trailer to be used with a tractor licensed as above, $5.00.

(l) Tractors, traction engines or other similar vehicles used for hauling purposes, except as hereinafter provided, shall pay the same fees according to their weight as hereinbefore required in this section of other vehicles. All owners of trailers used with a motor vehicle shall pay to the Secretary of State for each calendar year from and after January 1, 1952, flat weight taxes for the use of the public highways of this State at the following rates to-wit:

(1) Trailers having a gross weight of 2,000 pounds and less, including the weight of the trailer and maximum load, $1.00.

(2) Trailers having a gross weight of more than 2,000 pounds, and not more than 5,000 pounds, including the weight of the trailer and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(3) Trailers having a gross weight of more than 5,000 pounds, and not more than 10,000 pounds, including the weight of the trailer and maximum load, $44.00 until January 1, 1954, and thereafter $61.00.

(4) Trailers having a gross weight of more than ten thousand (10,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the trailer and maximum load, $79.00 until January 1, 1954, and thereafter $111.00.

(5) Trailers having a gross weight of more than fifteen thousand (15,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the trailer

and maximum load, $125.00 until January 1, 1954, and thereafter $175.00.

(6) Trailers having a gross weight of more than twenty thousand (20,000) pounds, and not more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

(7) Trailers having a gross weight of more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

Two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:

(1) Such vehicles having a gross weight of more than 12,000 pounds but not exceeding 14,000 pounds including the weight of the vehicle and the maximum load, $45;

(2) Such vehicles having a gross weight of more than 14,000 pounds but not exceeding 16,000 pounds including the weight of the vehicle and the maximum load, $70;

(3) Such vehicles having a gross weight of more than 16,000 pounds but not exceeding 20,000 pounds including the weight of the vehicle and the maximum load, $105;

(4) Such vehicles having a gross weight of more than 20,000 pounds but not exceeding 24,000 pounds including the weight of the vehicle and the maximum load, $145;

(5) Such vehicles having a gross weight of more than 24,000 pounds but not exceeding 36,000 pounds including the weight of the vehicle and the maximum load, $195.

The registration fee paid by the State of Illinois, or by any county, township, municipal corporation, city, village or incorporated town for each motor vehicle of the second division owned and operated by it, or by any school district for each motor vehicle of the second division owned and

operated by it as a school bus, shall be two dollars for each calendar year.

Upon the filing in the office of the Secretary of State of said application and payment of the registration fee as hereinbefore provided, the Secretary of State, or his duly authorized agent, shall, without further fee, assign to such trailer or semi-trailer as described in said application, a distinctive number plate which shall be attached to the rear of the trailer or semi-trailer. Such license plate shall be so attached as not to swing loosely and shall be not less than twenty inches above the surface of the ground. It shall at all times be kept clean from grease and dirt. None of the owners of the vehicles of said second division shall be required to pay the registration fees in section 8 of this Act. Provided, that none of the provisions of this Act requiring or prescribing registration shall be construed to include farm tractors, traction engines, threshing machines, clover huller, ensilage cutters, corn shredders, corn sheller, corn grinders, hay presses, portable saw mills, binders, combines, farm machinery and implements, farm wagons, or like vehicles, trailers or semi-trailers used in connection therewith, which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, or vehicles used exclusively for moving water well drilling outfits, but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers, or semi-trailers engaged in transporting agricultural products. The owner of any motor vehicle of the second division having a corn sheller, a well driller, hay press, clover huller or farm machinery permanently mounted thereon and used solely for transporting the same, shall pay the license fee of five dollars ($5.00), provided in the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act: Provided, that no such owner shall be entitled to any reduction in such five dollar ($5.00) license fee for the reason that such fee may first become payable during the second half of the calendar year.

Sec. 11a. Any person, firm or corporation who shall violate any of the provisions of Sections 3a, 9 or 10 shall be subject to a penalty of not less than $10.00, nor more than

$100.00 for each offense, together with costs of suit, and shall also be held liable for the payment of all damages caused to any public highway by such violation. Any vehicle used in violation of any section of this Act and thereby causing damage to any public highway shall be subject to a lien for the full amount of all unpaid registration fees, flat weight fees, penalties and damages; provided, however, that such lien shall not release the offender from the full payment of all registration fees, flat weight fees, penalties and damages which may be due from him or be recovered against him in any court of competent jurisdiction and, provided, also that such lien shall not be superior to any chattel mortgage or other lien attaching to such vehicle.

Sec. 20. Except as herein provided for foreign corporations, the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act, shall not apply to any motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence: and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor

vehicles, or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of section 8, 9, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned.

In order to effectuate the purposes of this section, the Secretary of State of Illinois shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees and flat taxes under which motor vehicles, trucks, tractors, trailers or semi-trailers properly licensed or registered in other states may be operated in this State without an Illinois registration or the payment of permit fees or flat taxes; provided like privileges are accorded to vehicles owned by Illinois citizens when operated in such other states.

Section 2. Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of said Act are repealed.

Section 3. This amendatory act shall be effective January 1, 1952.

APPENDIX "B"

Docket No. 32290—Agenda 37—January, 1952.

William E. Bode *et al.*, Appellees, v. Edward J. Barrett, Secretary of State, *et al.*, Appellants.

Mr. Justice Bristow delivered the opinion of the court:

This is a direct appeal by the Secretary of State, the Auditor of Public Accounts and the Treasurer of the State of Illinois, defendants below, from a final decree of the circuit court of Sangamon County, which declared unconstitutional and void an act of the Sixty-seventh General Assembly, approved by the Governor of Illinois on July 9, 1951, entitled "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k

and 9*l* of the 'Motor Vehicle Law,' approved June 30, 1919, as amended," (Laws of 1951, p. 1147,) and which enjoined and restrained the defendants from expending public funds in the administration and enforcement of the act and from doing any acts to enforce or administer the act.

In substance, section 9 of the Motor Vehicle Law as amended by the 1951 act (Ill. Rev. Stat. 1951, chap. 95½, par. 9) imposed on all owners of vehicles of the second division as defined in the act (trucks, busses, tractors, semitrailers, trailers, etc.) for the use of the public highways a substantially increased flat annual license tax, graduated in amount by brackets, according to gross weight, including weight of the vehicle and maximum load. Subsections (h), (h-1), and (i) to (i-4) inclusive, of said section, classified vehicles as to the number of wheels as well as gross weight. Subsection (j) provides that a self-propelled vehicle operated as a tractor and one semitrailer shall be considered as one vehicle in computing fees, but that a semitrailer used with any device for converting it to a trailer or attached to a leading trailer or a semitrailer shall be licensed as a trailer. Subsection (k) provides that each additional semitrailer to be used with a tractor, licensed as above, shall pay a license fee of $5.

Subsection (*l*) imposes a license tax on trailers graduated in brackets according to gross weight, including weight of trailer and maximum load, but different from other classifications in both weight brackets and tax. Thereafter, said subsection imposes a graduated license tax according to gross weight on "Two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission," at a substantially lesser rate than is imposed on other four-wheel vehicles in the same general gross-weight bracket.

The last paragraph of said section 9 as amended exempts, from the operation of the act, farm tractors, traction

engines, certain specifically described farm machinery, "or like vehicles, trailers or semi-trailers used in connection therewith, which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, * * * but nothing in this proviso shall exclude from registration, truck tractors, trucks, trailers or semi-trailers engaged in transporting agricultural products."

The amendatory act of 1951 also repealed outright former sections 9b to 9l, inclusive, of the Motor Vehicle Law (Ill. Rev. Stat. 1949, chap. 95½, pars. 10a to 10k, incl.,) which sections provided for an optional mileage weight license tax in lieu of a flat weight tax on vehicles of the second division at the election of the vehicle owners under certain conditions.

Sections 11a and 20 of the Motor Vehicle Law (Ill. Rev. Stat. 1951, chap. 95½, pars. 12a and 22,) were amended by striking therefrom all reference to the optional mileage weight taxes previously contained therein. Otherwise, they are identical with the previously existing sections.

Section 20 of the act (Ill. Rev. Stat. 1951, chap. 95½, par. 22,) specified the manner of application of the act to nonresident owners and, in order to effectuate the purpose of the section, authorizes the Secretary of State to enter into reciprocal agreements with responsible officers of other States as to license fees, permits, and flat taxes, under which nonresidents' second division vehicles may be operated in Illinois without an Illinois registration, provided like privileges are accorded to vehicles owned by Illinois citizens.

The plaintiffs brought this suit as citizens and taxpayers of the State of Illinois on behalf of themselves and all other taxpayers of the State pursuant to the statute authorizing suits in equity by taxpayers, in proper cases, to restrain the disbursement of public moneys by officers of the State. (Ill. Rev. Stat. 1951, chap. 102, pars. 11-16.) Each of the plaintiffs is a citizen, a taxpayer, the owner of a truck currently and properly registered, and the holder of a certificate of convenience and necessity as a local carrier

under the provisions of the Illinois Truck Act. Ill. Rev. Stat. 1951, chap. 95½, pars. 240-282.

The complaint filed by the plaintiffs directly challenged the constitutionality of the amendatory act in question in numerous respects which may be summarized as follows:

I. By ignoring the difference in use of the highways by the various established classes of vehicles, *viz:* line-haul and other common carriers, local carriers, private carriers, contract carriers and specialized carriers, said act imposes a burdensome graduated flat tax, which,

a. Bears no fair relation to the privilege of using the highways and is in violation of sections 1 and 2 of article IX of the constitution.

b. Has no consistent theme of classification, contrary to sections 1 and 2 of article IX and to section 22 of article IV of the constitution.

c. Thereby is discriminatory as between classes of users and confiscatory as to some, in violation of section 2 of article II of the Illinois constitution, and the fourteenth amendment to the constitution of the United States.

II. The amendment violates article III and section 2 of article II of the constitution in the following respects:

a. It creates a favored class of two-axle busses operating in a municipality or municipalities or "close radius thereof" without defining said terms.

b. It bases the tax on "maximum load" while giving no standard for determining the same.

c. It creates confusing and indefinite classifications and omits vehicles authorized by law to use the road.

d. It authorizes the Secretary of State to enter into reciprocal agreements with responsible officers of other States, which is in violation of section 8 of article I of the constitution of the United States.

e. It creates an indefinite agricultural exclusion.

f. It creates a confusion as to trucks of school districts or imposes a heavy tax thereon, which is in violation of sections 3 and 10 of article IX of the Illinois constitution.

III. The heavy flat tax imposed discriminates against Illinois residents and nonresidents from nonreciprocal States in favor of nonresidents from reciprocal States, and imposes an undue burden on interstate commerce in violation of section 8 of article I of the constitution of the United States, and is arbitrary and discriminatory in violation of section 2 of article II of the Illinois constitution and the fourteenth amendment to the constitution of the United States.

The trial court, after hearing the evidence, found the act unconstitutional on each of the counts alleged and entered an injunction order as previously stated.

Both parties attach importance to the historical development of the motor vehicle law in Illinois and a correct understanding thereof is pertinent to the decision in this case, particularly as concerns vehicles in the second division (all vehicles other than those designed for carrying not more than seven persons.)

The original Motor Vehicle Law was approved on June 30, 1919, and, as amended from time to time, remains in effect today. (Ill. Rev. Stat. 1951, chap. 95½, pars. 1 *et seq.*) Section 3 of the original act fixed maximum weights and dimensions of vehicles and was amended from time to time until finally repealed in 1935 upon adoption of the Uniform Act Regulating Traffic on Highways, (Ill. Rev. Stat. 1951, chap. 95½, pars. 98 *et seq.*,) which covered the same subject matter.

Section 9 of the act, since its adoption, has continuously imposed a flat annual license fee for the use of the highways upon second division vehicles, based upon gross weight of the vehicle and maximum load, graduated in amount according to weight brackets or classifications. Amendments from time to time added new weight brackets, revised existing weight brackets, and established separate classifications and brackets for special types of vehicles such as trailers, semitrailers, combinations and busses. Until the 1951 amendment in question, no significant or substantial increases had been made in license fees imposed by section 9. The section, as originally enacted, exempted tractors, traction engines, or other similar vehicles

used exclusively in agricultural pursuits, from its application. This proviso excluding farm vehicles was amended in 1931 by adding a number of specifically described agricultural machines and the following language: "or other similar vehicles or trailers, or semi-trailers used in connection therewith which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of, others, * * * but this exception in the proviso shall not exclude from registration trucks, trailers or semi-trailers engaged in transporting agricultural products." (Laws of 1931, p. 788.) This proviso exempting agricultural machines has remained substantially unchanged to the present time.

In 1921, section 9-A was added to the Motor Vehicle Law imposing an additional license fee on certain vehicles carrying freight or passengers for hire on the basis of a specified rate per mile travelled. (Laws of 1921, p. 577.) This section was amended in 1923 to impose an additional tax on such vehicles on the basis of a certain rate for each one-hundred pounds of gross weight of vehicle and load. (Laws of 1923, p. 552.) Such amendment also provided that the weight of freight vehicles should be computed by adding "manufacturers rated carrying capacity" to the weight of the vehicle fully equipped. This section continued substantially the same until repealed in 1935.

Upon repeal of section 9a in 1935, the act was amended to include an optional mileage weight tax, whereby a license tax was imposed measured by the number of miles actually travelled in the State by the vehicle, graduated in rate according to gross-weight brackets. (Ill. Rev. Stat. 1949, chap. 95½, pars. 10a to 10k, incl.) Operators were given an option to register their vehicles and to pay license fees under either the annual flat tax or the mileage weight tax. This amendment remained in force substantially in the same form until repealed by the 1951 amendment.

In 1945, the provisions of the Uniform Traffic Act regulating weight, load and length (Ill. Rev. Stat. 1945, chap. 95½, pars. 221-232, incl.) were amended so as to eliminate in general the word "wheel" from the act and to establish maximum weight limits by vehicles classified as to number

of axles and weights per axle. No such classification has ever been uniformly adopted in section 9 of the Motor Vehicle Law, but it has retained primary classifications of vehicles by wheels.

Section 20 of the act, as originally adopted in 1919, in general exempted nonresident passenger vehicles from the act, provided the owner had complied with any law requiring registration of his vehicle in the State of his residence, but only to the extent that the laws of the nonresident's State granted like exemptions and privileges to vehicles owned by residents of this State. In 1929, the act was amended so as to exempt nonresident vehicles of the second class as well as passenger vehicles on the same conditions. The act has continued in force to the present date in substantially the same form except that in 1945 the second paragraph providing for reciprocal agreements by the Secretary of State was added.

From the foregoing, it appears that the principal changes made by the 1951 amendment to the Motor Vehicle Law are:

A. A substantial increase as of January 1, 1952, in annual flat license fees for vehicles of the second division with provision for further increases as of January 1, 1954.

B. Repeal of the optional mileage weight tax.

C. Creation of a new classification of two-axle busses with shock absorbers subject to Illinois Commerce Commission regulation operating in municipalities or a close radius thereof, with no substantial license increase as to such classification.

The plaintiffs introduced in support of their contentions the testimony of several truck operators of various classes and a large volume of documentary evidence. As of May 1, 1951, there were in the State of Illinois 151 authorized line-haul carriers, 20,523 authorized local carriers, 2,380 specialized carriers and 1,766 contract carriers, as those types of carriers are defined in the Illinois Truck Act. (Ill. Rev. Stat. 1951, chap. 95½, pars. 240 *et seq.*) To establish the large annual mileage travelled by line-haul carriers, the plaintiffs introduced testimony and reports of one

carrier of such classification, the Peoria Cartage Company, showing an annual average mileage for 46 tractor units of 68,097 miles. To establish the large annual mileage of city busses the records of Illinois Transit Company, Danville City Lines, Springfield Transportation Co., Champaign-Urbana Lines, Inc., and Decatur City Lines, Inc., were introduced showing an average annual mileage per bus of 43,628 miles and records of Chicago Motor Coach Company were introduced showing an average of 49,500 miles per bus. To establish the low annual mileage of private and local carriers, the plaintiffs first introduced records of about ten operators in each of five different weight brackets who had been operating under the mileage weight option, showing an average annual mileage per private carrier of 3982 miles. The mileage records of several other truckers operating under the mileage weight option were also introduced, including those of 25 Chicago coal companies operating 108 trucks, showing an annual average of 4232 miles per truck, and eight interstate truckers' records were introduced. The testimony of three farmers who operated trucks showed variations of from 3500 to 10,000 miles per year per truck. A tabulation as to the effect of the new rates on the various truckers mentioned in plaintiffs' evidence by classification shows an increase from 243 per cent to 1363 per cent for private carriers, from 309 per cent to 1404 per cent for Chicago coal operators, from 238 per cent to 344 per cent for local carriers serving farmers, 739 per cent for a local business carrier, 315 per cent and 363 per cent for two local transfer companies, and 370 per cent for a specialized carrier. It is to be noted that most of the operators cited used the optional mileage weight tax. One witness for the plaintiffs testified that he intended to sell his truck, and another testified that he was thinking of doing so. The testimony of four witnesses for the plaintiffs showed that the increase in tax will exceed their past net profits and probably force them out of business. Two other of plaintiffs' witnesses testified that they could not pass the increase on to customers because of ceiling prices or competition from other types of carriers. Other evidence was introduced by the plaintiffs showing

that there are in existence and use some four-wheel vehicles exceeding in gross weight 30,000 pounds, showing that in the motor industry the number of wheels per axle of the vehicle is variable, and showing various facts concerning capacity of trucks, weight distribution on axles and weight distribution in combined vehicles, and various other facts pertinent to the motor industry.

Defendants' evidence, although relatively brief, bears primarily on the underlying theory of the increased license taxes imposed by the amendatory act in question. The tabulated results of a detailed engineering survey of the estimated needs, both in mileage and cost, to meet present and future deficiences of the State primary highway system during the period of 1951 to 1960, were introduced, from which it is indicated that during said ten-year period there would be a need for 7466.20 miles of highway construction at a total estimated cost of $1,151,041,232 to the State.

An estimate of the funds available for State primary highway constructions during said ten-year period, based on the 1950 level of motor vehicle registration and the 1950 motor fuel tax, was next introduced. Estimated receipts were based on the license fees imposed by the 1951 amendment, as well as receipts from all other sources, including a five-cent motor fuel tax and operators' licenses. Such report showed a sum of $676,961,887 available from those sources during the ten-year period for construction of highways. A State engineer testified that the increase in the 1951 vehicle registrations and fuel consumption over the base year of 1950 just about offset the estimated increase in construction cost for the same period. Thereafter the calculations made by the State Department of Public Works and Buildings to equalize passenger car taxes on a ton-mile basis through truck license fees and a five-cent motor fuel tax was introduced. The calculations start with the 1949 motor vehicle registration broken down as to both type and weight class of vehicle and as to flat fee or mileage weight trucks. Such tabulation shows 1949 registrations of 2,078,704 passenger vehicles; 324,109 flat license trucks and 11,935 mileage weight trucks. The 1950 regis-

trations showed 2,286,572 passenger vehicles, 347,032 trucks and 58,415 trailers. The average travel per year of each type of vehicle is next shown in the calculations. These figures were taken from a comprehensive report made in 1948 covering the Illinois highway problem by an independent engineering concern employed by the State of Illinois for that purpose.

From evidence introduced at the trial, such average travel-per-year figures were based on the results of a questionnaire survey of motor vehicle owners and operators made in the late thirties in Illinois and other States, as were other figures used, such as fuel consumption, modified as justified by later information.

After computing the vehicle miles per class per year, the calculations coinputed the total gallons of motor fuel used per class per year, based on average miles per gallon of fuel per class, and thereby determined the motor fuel tax revenue at the five-cent rate by class of vehicle. Applying the average gross weight in tons by class, as determined from the independent engineer report and sample weighings of trucks in Illinois over a three-year period, to the vehicle miles per class per year, the ton miles per class of vehicle was determined. The ton-miles per class were then divided into both motor fuel tax revenue and license fee revenue by class to determine the total fees per ton-mile paid by various classes of vehicles for the privilege of using the highways. It was thereby found that passenger vehicles paid a fee of $0.00251 per ton-mile and that, except for trucks under 3000 pounds, trucks paid a substantially less amount per ton-mile.

Thereupon, calculations were made to determine the average change in revenue per truck by class which was necessary to equal the ton-mile fees paid by passenger vehicles. Flat license fees per weight bracket as adopted by the 1951 amendment apply and adopt the license fees as thus equalized, rounded out to the nearest dollar. The records of sample weighings of two-axle trucks by the State in the years 1946, 1948 and 1949, show a total of 12,311 such trucks, their weight and distribution in the various weight brackets. Of this number, one such truck,

only, exceeded 30,000 pounds in weight and was illegally overloaded on the rear axle. A State official from the office of Secretary of State, charged with administering the motor vehicle law, testified that for more than the past seventeen years it has been the practice in that Department to consider motor vehicles as having two wheels per axle and one axle per each two wheels. He also testified that the combination of "weight of vehicle" and "weight of maximum load" for license purposes was determined solely from the sworn affidavit of the application for license, which system had been in force in his Department for more than seventeen years and had caused no confusion in the office in the administration of the act.

The act imposes a tax on motor vehicles for the use of public highways by its explicit terms, which tax, pursuant to the Motor Vehicle Act, must be deposited in a special road fund to be used only for retirement of bonded indebtedness for construction of highways, payment of the cost of administration of said act, and for improvement and maintenance of the highways of the State. The tax under consideration here is not unlike the motor fuel tax or wheel tax ordinances which impose taxes for the privilege of using vehicles on the streets and highways. This court has held in *People* v. *Deep Rock Oil Corp.* 343 Ill. 388, and *City of Lincoln* v. *Gerard,* 329 Ill. 501, that such a tax is an excise or privilege tax and not a property tax. The owner of such vehicle may be required to pay an *ad valorem* tax thereon and may likewise be required to pay a tax upon the right or privilege of the use of the highways, which is an entirely different matter.

The use taxed by the 1951 act is a use which exploits the public highways of the State. We do not now decide whether "use taxes" in general, of the sort countenanced by the constitutions of many other States, are or are not valid under our own constitution of 1870. What we do hold is that a tax for the privilege of the use of the highways is not invalid as a property tax upon the vehicles that use the thoroughfares of the State.

Taxation upon values, an occupation tax or license, and a tax on the privilege of using vehicles on the public

streets are different subjects and do not constitute double or triple taxation because paid by one person. (*City of Lincoln* v. *Gerard*, 329 Ill. 501; *Roe* v. *City of Jacksonville*, 319 Ill. 215.) That a State has power to select that use, as distinguished from others, upon which to impose an excise tax has been definitely settled by the decisions of this court and courts of other jurisdictions, and in cases of this nature they have clearly been held to be an excise or privilege tax. (*People* v. *Deep Rock Oil Corp.*, 343 Ill. 388; *City of Lincoln* v. *Gerard*, 329 Ill. 501; *Kane* v. *New Jersey* (1911), 81 N.J.L. 594, L.R.A. 1917 B 553, affirmed in 242 U.S. 160, 61 L. ed. 222, 37 S. Ct. 30: *Interstate Busses Corp.* v. *Blodgett* (1928), 276 U.S. 245, 72 L. Ed. 551, 48 S. Ct. 230; *Peterson* v. *Department of Public Works* (1931), 234 N.W. 95 (Neb.); *Camas Stage Co.* v. *Kozer* (1922), 104 Ore. 600, 25 A.L.R. 27, 209 Pac. 95; *State* v. *Caplan* (1927), 100 Vt. 140, 135, Atl. 705; *Johnson Transfer and Freight Lines* v. *Perry* (1931) (Ga.), 47 Fed. 2d 900; *Rocky Mountain Lines* v. *Cochran* (1941) 140 Neb. 378, 299 N.W. 596.

In the case of *People* v. *Deep Rock Oil Corp.* 343 Ill. 388, it is to be noted that this court, in passing upon the validity of the Motor Fuel Tax Act there in question, observed that at the same session of the legislature which passed the Motor Fuel Tax Act, sections 8 and 9 of the Motor Vehicle Law were amended, and that the fees collected from both acts were deposited and set apart as a special fund known as the road fund to be used for the purposes specified in section 36 of the Motor Vehicle Law. This court then said: "All of said acts, having been passed at the same session of the legislature, the rule of construction applicable thereto is that each should receive a construction, if possible, which will give effect to all * * * of the acts. [Citations.] When these acts are read together, they provide a complete scheme for financing state road construction in this State. These taxes, while both excises, are similar neither in character nor amount. One is based on the character and horsepower of the vehicle, and the other is limited to the use of the highways as measured by the amount of gasoline consumed in such use."

We must observe that, at the same session of the legislature in which the amendatory act here in question was passed, the Motor Fuel Tax Act was amended providing for an increase in motor fuel taxes to four cents per gallon from August 1, 1951, to December 31, 1952, and thereafter at five cents per gallon.

There is no constitutional inhibition against more than one privilege or excise tax where the total does not exceed reasonable taxation for the privilege enjoyed. It is incumbent on the plaintiffs to show that the aggregate charge bears no reasonable relation to the privilege granted. *People* v. *Deep Rock Oil Corp.* 343 Ill. 388.

The fact that public highways and their use are public property has been so thoroughly established that the general proposition has been affirmed that no person has the right to conduct a business upon them or to devote them to private gain except as the State, by acquiescence or by law, may permit him. Clearly "Their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit." *Stevenson* v. *Vinford* (1932), 287 U.S. 251, 77 L. ed. 288, 53 S. Ct. 181, 87 A.L.R. 721.

The leading case on the right of a State to tax motor vehicles and interstate commerce is *Hendrick* v. *Maryland* (1915), 235 U.S. 610, 59 L. ed. 385, 35 S. Ct. 140. It held that a State may require persons operating motor vehicles in a State to obtain a license or registration certificate from a State authority and to pay a fee therefor. The charging of fees was held to be justified as a contribution to the expense of departmental supervision and police oversight and as compensation for the use of the State's highways. The court said: "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public and is also abnormally destructive to the highways themselves. Their success depends upon good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever increasing number of those who own such vehicles." After observing that, in

the absence of national legislation covering the subject, a State may prescribe uniform regulations for motor vehicles under its police power and that the reasonableness of the State's action is always subject to inquiry so far as it affects interstate commerce, the court declared further:

"In view of the many decisions of this court, there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform fair and practical standard, they constitute no burden on Interstate commerce * * *. The action of the state must be treated as correct, unless the contrary is made to appear."

The above decision was followed in a second leading case, *Kane* v. *New Jersey* (1916), 242 U.S. 160, 61 L. ed. 222, 37 S. Ct. 30, which enlarged its application. In that case the statute provided that all moneys received from license and registration fees in excess of the amount required for the maintenance of the motor vehicle department should be applied to the maintenance of improved highways. It appeared that the aggregate of these fees for the current year had yielded a large sum for maintenance of the improved roads of the State. The court sustained the statute, among other things noting that the principle of *Hendrick* v. *Maryland* applied to the amount of fees charged although they were shown to result in a surplus over the expenses of maintaining the regulation and inspection department, the surplus being applied to the maintenance of improved roads.

The doctrine of *Hendrick* v. *Maryland* was extended to common carriers by motor vehicles in *Clark* v. *Poor* (1927) 274 U.S. 554, 71 L. ed. 1199, 47 S. Ct. 702. There, the court held that common carriers for hire who make the highways their place of business may properly be charged an extra tax for such use.

Thereafter, in *Interstate Busses Corp.* v. *Blodgett* (1928), 276 U.S. 245, 72 L. ed. 551, 48 S. Ct. 230, the

court established, as to interstate carriers, that: first, the tax need not be of the nature of a license or registration fee but may be an outright tax directly charged upon the carrier in respect of its actual highway operations if it is devoted to highway purposes; second, the tax may be different in form and basis from that levied upon similar intrastate carriers; third, that the interstate carrier is entitled to relief against the special tax levied upon him as such if it proves as a fact that the tax imposes a substantially greater burden upon it than upon those engaged in the corresponding intrastate business; or, fourth, proves as a fact that the aggregate charge bears no reasonable relation to the privilege granted.

In *Interstate Transit* v. *Lindsey* (1931), 283 U.S. 183, 75 L. ed. 953, 51 S. Ct. 380, Tennessee levied a privilege tax on interstate busses alone in which a tax graduated according to carrying capacity was imposed and the amount was $500 per year for all busses seating from twenty to thirty passengers. The court declared the act invalid, holding that as the tax was a direct burden on interstate commerce, it could not be sustained except upon an affirmative showing that it was levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This the court said might usually be indicated either by the nature of the imposition such as that of a mileage tax, or by an express allocation of the proceeds to highway purposes.

In *Hicklin* v. *Coney* (1933), 290 U.S. 169, 78 L. ed. 247, 54 S. Ct. 142, a license fee laid upon private contract carriers according to the size and weights of the trucks was sustained, the court presuming that it was charged as compensation for the use of the roads. In its decision the court distinguished the *Lindsey case* from one in which the statute distinctly allocated the proceeds of the tax to highway purposes.

The result in general legislation and State court decisions thereafter seems to be an assumption that a test of the validity of such taxes was their specific appropriation to highway purposes.

However, in *Morf* v. *Bingaman* (1936), 298 U.S. 407, 80 L. ed. 1245, 56 S. Ct. 756, the court held that at least in the case of a fee charged for the privilege of using the State's highways:

"It is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges, or in some other."

Also, in *Dixie-Ohio Express Co.* v. *State Revenue Commission* (1939), 306 U.S. 72, 83 L. ed. 495, 59 S. Ct. 435, the court again held that if the tax is a reasonable compensation for the privilege of using the highways, it is not essential to its validity that the State use the proceeds of it for other purposes than the construction, improvement or maintenance of its highways. In that case the appellant had contended that the tax by weight upon its vehicle was not a fair compensation for its use of the highways because the proceeds were allocated to the upkeep of rural highways, none of which the appellant used. The court's pronouncement went further, however, than the mere rejection of this argument. The decision seemed to settle two points, specifically: first, that it is not essential to the validity of the tax as touching interstate commerce that its proceeds be actually appropriated to highway purposes, and, second, that it is not essential to that validity, as concerned the appellant, that its use of the highways is not enough to warrant the tax, if the privilege of using them is of sufficient value to warrant it.

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Com.* (1935), 295 U.S. 285, 79 L. ed. 1439, 55 S. Ct. 709, the proposition laid down in the *Lindsey case* that the measure of the tax should somehow relate to the carriers' use of the highways was drawn into question when the court held that the State could require payment of a moderate license fee in the same amount from all motor carriers regardless of the extent to which each used the highways.

In *Aero Mayflower Transit Co.* v. *Railroad Comrs.* (1947, 332 U.S. 495, 92 L. ed. 99, 68 S. Ct. 167, the court held valid a Montana statute which imposed a flat license fee and a tax on gross operating revenue in con-

sideration of the use of the highways of the State, none of which fees were segregated but all of which were paid into the State's general fund. The opinion declared it too late to question that a State may levy upon motor vehicles a reasonable nondiscriminatory tax as compensation for the use of its highways and that it was immaterial whether the proceeds are allocated to highway uses or others.

The most recent case involving this problem appears in *Capitol Greyhound Lines* v. *Brice* (1950), 339 U.S. 542, 94 L. ed. 1053, 70 S. Ct. 806, 17 A.L.R. 2d 407. In this case the court sustained an *ad valorem* tax imposed by the State of Maryland on vehicles as a condition to their original registration or reregistration. The effect of this case is to hold that a tax of this nature should be judged by its result, not its formula, and must stand unless the amount is shown to be in excess of fair compensation for the privilege of using State roads.

From the foregoing, it is concluded that the State has the power and right to impose an excise tax on motor vehicles for the privilege of using State roads, the constitutionality of which is not *to* be measured by the formula imposing the tax. The proper test of constitutionality is whether or not the total of excise taxes levied for the privilege of using State roads produces an amount which is shown to be in excess of fair or reasonable compensation to the State for such privilege.

Since the formula used in imposing the tax is not a measure of constitutionality so long as it may be deemed a reasonable exercise of legislative judgment, it is not required that motor vehicle license laws necessarily be framed on the basis of mileage taxes, and numerous cases have so held. (*Carley and Hamilton, Inc.* v. *Snook*, 281 U.S. 66, 74 L. ed. 704, 50 S. Ct. 204; *Aero Mayflower Transit Co.* v. *Georgia Public Service Co.* 295 U.S. 285; *Dixie-Ohio Express Co.* v. *State Revenue Com.* 306 U.S. 72; *Hicklin* v. *Coney*, 290 U.S. 169.) So long as the tax imposed returns not in excess of a fair and reasonable compensation for the privilege of using the State roads, the tax may be imposed as a flat license fee, as an inspec-

tion fee, or may be a tax measured by weight or load capacity, by mileage, by weight and mileage, by passenger capacity, by passenger capacity and weight, by passenger capacity and mileage, by value of vehicle, or by fuel purchased or consumed. See cases cited in annotation appearing in 17 A.L.R. 2d 421.

It is true that the State, in the discretion of its legislature, may tax carriers for hire at rates exceeding those imposed upon private carriers. (*Dixie-Ohio Express Co.* v. *State Revenue Com.* 306 U.S. 72.) However, there is no constitutional requirement that a difference in rate be made between private carriers and carriers for hire. (*Eavey Co.* v. *Dept. of Treasury of Indiana,* 216 Ind. 255, 24 N.E. 2d 268 (1939), appeal dismissed for want of substantial Federal question in 310 U. S. 611, 84 L. Ed. 611, 60 S. Ct. 1081.) In the last case cited, an act of the Indiana legislature had removed an exemption of shipper-owners' trucks from the Indiana motor vehicle weight tax so that they were taxed on the same basis according to weight as were trucks and carriers for hire. The court there held that the taxation of trucks of shipper-owners and those of carriers for hire upon the same basis was entirely reasonable and not subject to constitutional objection, saying: "It is well known that under the law existing before the enactment of chapter 255, certain shipper-owners were not taxed. The legislature evidently concluded that the untaxed shipper-owner possessed an advantage over contract carriers and those who kept trucks for hire and concluded that one caused as much wear and tear on the highways as the others and that the shipper-owner in all fairness should be subject to a tax in order to pay for his proportionate part of the construction and upkeep of the highways. Instead of subdividing the class and exempting certain owners of trucks as was done by the 1933 tax, both trucks used by owners in transporting their own products and trucks used for hire are placed in the same class and made subject to the same weight tax by chapter 255."

So long as the total amount produced by the tax is not in excess of fair or reasonable compensation for the privilege of using the roads, mathematical accuracy in whatever

formula is used is not required but "rough approximation rather than precision suffices. (*Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542.) As this court said in *Schreiber* v. *County of Cook*, 388 Ill. 297: "Perfect equality and uniformity of taxation as regards individuals or corporations or different classes of property subject to taxation can hardly be visualized. Absolute equality is impracticable in taxation and is not required by the equal protection clause of the constitution. Inequalities that result occasionally and incidentally in the application of a system that is not arbitrary in its classification, and not applied in a hostile and discriminatory manner, are not sufficient to defeat the tax. [Citations.] Mere inequities in the administration of the law violate no constitutional rights."

The fact that a tax, as applied to an individual, may put such individual out of business is not considered a valid argument against the tax, if the tax is otherwise reasonable in the relation to the cost of the highways or the abstract value of the privilege of using them. *Grolbert* v. *Railroad Comrs.* (1932, Ia.), 60 Fed. 2d 321; *State* v. *Overstate Transportation Co.* (1931), 101 Fla. 1143, 132 So. 825; *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 78 L. ed. 1109, 54 S. Ct. 599.

"One who receives a privilege without limit," said the Supreme Court of the United States in *Aero-Mayflower Transit Co.* v. *Georgia Public Service Com.*, 295 U. S. 285, "is not wronged by his own refusal to enjoy it as freely as he may." In that case the Supreme Court of the United States sustained a statute of the State of Georgia licensing the use of trucks on the public highway.

Indeed, even when the tax is imposed upon a nonresident and wholly with respect to interstate commerce, a State may tax the full measure of the privilege granted regardless of how little the privilege is exploited. In *Hicklin* v. *Coney*, 290 U.S. 169, the Supreme Court of the United States sustained a State automobile license tax upon a nonresident who was compelled to pay a tax of $400 for a single trip into the State with a single vehicle. The privilege granted entitled the licensee to make unlimited use of the State's highways. That the licensee, for reasons

of his own, availed himself of the privilege only once in the year raised no constitutional objection to the tax. See, also, *Capitol Greyhound* v. *Brice*, 339 U.S. 542, upholding a State act that licensed and taxed busses by an *ad valorem* exaction in addition to general property taxes. Objection was made that, at least with respect to nonresident owners, this tax bore no reasonable relation to the value of the use of the highways licensed under the act.

If a State may thus tax nonresident owners with respect to interstate commerce, measuring the tax by the value of the privilege granted and disregarding the extent to which the privilege is availed of, *a fortiori* it may tax its own citizens for the privilege of using State highways without regard to how much or how little the licensees actually take advantage of the privilege conferred upon them.

In the *Mangano case* the United States Supreme Court, in sustaining the validity of a State statute imposing a large excise tax on butter substitute sold within the State said: "The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10% tax imposed upon the notes of state banks involved in *Veazie Bank* v. *Fenno*, 8 Wall 533, 19 L. ed. 482. This court there disposed of it by saying that the courts are without authority to prescribe the limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' Again in the *McCray case*, 195 U.S. 27, 49 L. ed. 78, 24 S. Ct. 769, answering a like contention, this court said that the argument rested upon the proposition 'that although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore, the power to levy the tax did not obtain. This however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that

if a tax be within the lawful power of the legislature, the exertion of the power may not be restrained because of the results to arise from its exercise."

As to classification and subclassification within the act, it must clearly appear that the judgment of the legislature is erroneous or that the discretion vested in the legislature has been arbitrarily abused. In *Melton* v. *City of Paris*, 333 Ill. 190, this court sustained the validity of a wheel-tax ordinance which separately classified passenger carrying busses, trailers and property hauling vehicles, imposing a specific tax rate for each class. We there said: "Even though the municipality, under authority of the statute, may have had the power to make other classifications and distinctions between vehicles of the same class as to carrying and motive power other than those provided by the ordinance, yet the failure so to do did not render the ordinance unreasonable or unconstitutional, provided the classification and the rates charged were reasonable, were authorized by the statute and all persons within the class were treated alike. Before a court will override the judgment of a legislative body it must clearly appear that the judgment of such body is erroneous or that the discretion vested in the municipal authorities has been abused. A court will not hold an ordinance void and unreasonable where there is room for a fair difference of opinion upon the question, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose. [Citations.] The classification as provided in the ordinance was not unreasonable, it did not violate any constitutional provision, and the decree was not erroneous in so finding."

The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty per cent of the revenues needed by the State for the maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used. It also appears that the Motor Vehicle Law imposes a tax on trucks graduated according to weight bracket

which, when combined with the motor fuel taxes paid, will approximately equalize the taxes paid per ton-mile of all motor vehicle operators, passenger and truck. The taxes imposed by the amended act have a reasonable basis, are not discriminatory, and do not produce a revenue in excess of fair and reasonable compensation for the privilege of using the State roads. The act is not arbitrary nor discriminatory in violation of the due process clauses of either the Federal or State constitutions.

Plaintiffs also contend that subsection (*l*) (7) of section 9 of the act is invalid as a vague, indefinite and unworkable classification. Such subsection imposes a specified tax on "two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality * * * and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulations of the Illinois Commerce Commission." The complaint made is that there is no definition of the word "municipality" or the phrase "or a close radius thereof." The intent of the legislature must be given effect, if possible. In *Peabody* v. *Russel*, 301 Ill. 439, this court said in that respect: "It is a canon of construction well recognized, not only in this court but in courts of other jurisdictions, as it relates to statutes, that the chief purpose is to give effect to the intention of the legislature. In seeking such intention courts are to consider the language used, the object to be attained or the evil to be remedied. This may involve more than the literal meaning of the words. That which is within the intention is within the statute though not within the letter, and though within the letter, it is nevertheless not within the statute if not likewise within the intention."

It is to be noted that this subclassification refers to busses whose rates for transportation are subject to regulation by the Illinois Commerce Commission. The only other statutory provision pertaining to operation of busses within municipalities and subject to Illinois Commerce Commission regulations is found in article VI of the Public Utilities Act relating to local utilities. (Ill. Rev. Stat. 1951,

chap. 111⅔, pars. 85-90.) By specific definition in section 10-18 of the Public Utilities Act, its provisions apply only to cities, villages and incorporated towns. It is therefore apparent that the legislature, by the use of the word "municipalities" in the statute in question intended to and did refer only to cities, villages and incorporated towns. The phrase "or a close radius thereof" must be read with the rest of the section also. It is clear that the class created is limited to busses operating within a single municipality or contiguous municipalities or a close radius thereof and excludes all busses operating between noncontiguous cities or intercity busses. It is apparent that the legislature recognized and established as a separate class those city bus lines which, in order to give adequate local service, operate in suburban areas outside of municipalities but which do not operate as "over the road" busses between cities, using the principal State highways for such purpose. Such difference in bus service is recognized by the Illinois Commerce Commission in classifying local bus service as distinguished from over-the-road bus service. Thus the phrase "or a close radius thereof" expresses a well-recognized, ascertainable, unambiguous concept. Subsection (*l*) (7) of section 9 of the amended act is not vague, indefinite and thereby unconstitutional, nor does it contain an unconstitutional delegation of legislative authority.

Plaintiffs also contend that the act, by failing to define gross weight of maximum load, is unconstitutional because of being vague, indefinite and a delegation of legislative authority. This precise language has been continuously in section 9 of the act without change since its original enactment. The evidence shows that the meaning of this phrase has been well understood and has had a continuity of legislative and administrative interpretation of thirty-two years and that the same has caused no confusion, and no one in the case testified as to the existence of any confusion or misunderstanding in respect thereto. The owner in applying for registration states under oath, in his application, the weight of his vehicle, the maximum load and the sum of the two, being the gross weight. The term maximum load has been consistently interpreted as

the maximum load the owner intends to carry during the registration period. The Motor Vehicle Law prohibits the use of the highways by a vehicle the gross weight of which exceeds that stated in the application blank and the evidence carried on the plates on the vehicle. Such language is clear and definite and does not delegate any legislative authority to the Secretary of State.

Plaintiffs further contend that section 20 of the act, as amended, is invalid as an unconstitutional delegation of legislative authority. It is to be noted that the first paragraph of section 20 was enacted in substantially its present form in 1919. Such first paragraph provides a reciprocity as to nonresidents of Illinois only to the extent that the nonresident State grants like exemptions and privileges to residents of this State. Such section was specifically held constitutional in *Brashear Freight Lines* v. *Hughes*, 26 Fed. Sup. 908. The second paragraph of said section is authority to the Secretary of State to "effectuate the purposes" of the first paragraph by entering into a reciprocal agreement with other States.

In *Interstate Trucking Co.* v. *Dammann*, 208 Wis. 116, 241 N.W. 625, 82 A.L.R. 1080, the Supreme Court of Wisconsin considered identical charges of invalidity against a Wisconsin statute and held the act valid, saying: "The Secretary of State is empowered to enter into such an agreement of reciprocity only when 'like privileges are accorded to vehicles owned by Wisconsin citizens in such other states.' That does not necessarily contemplate a bartering and trading between states by their authorized officers, which ultimately culminates in a contract, the terms and relative advantages of which may vary with the ability or inclinations of the negotiators. On the contrary, the statute may rightly be held to contemplate the ascertainment by the respective responsible officers of the existence and scope of reciprocal legislation, and of the conditions prescribed by the legislature to render the same effective; and, that, when the existence of such legislation and the scope thereof have been determined by such officers, then, in furtherance of the legislative authorization, and within the limitations and standard prescribed thereby, the re-

sponsible officer shall conclude an arrangement or agreement which will officially be evidence or certify to conformance to such legislative standard, and the resulting reciprocity for which the legislature provided. Thus construed the authorization to the Secretary of State by the Legislature is well within its powers."

Such statute limits the authority of the Secretary of State to ascertainment of the existence and scope of reciprocal legislation, and whether, in fact, reciprocity can be granted under the provisions of section 20. As said by the United States Supreme Court in *Kane* v. *New Jersey*, 242 U.S. 160: "Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of highways. It has become common in State legislatures and New Jersey has embodied it in her laws since the trial of this case in the lower court."

Our conclusion that the reciprocity provision of the act merely empowers the Secretary of State to ascertain which States grant reciprocity to Illinois residents and to embody his findings in the official form of a "reciprocity agreement" not only disposes of plaintiffs' contention that the act delegates legislative authority but also disposes of plaintiffs' contention that such reciprocity agreements violate that provision of section 10 of article I of the constitution of the United States which provides that "No State shall, without the Consent of the Congress, * * * enter into any Agreement or Compact with another State."

There is, however, another conclusive answer to plaintiffs' contention that such reciprocity agreements would constitute a "compact with another State" in violation of the Federal constitutional provision last above quoted. A consideration of the authorities demonstrates that "agreements," such as those giving effect to reciprocity provisions in automobile licensing cases, are not at all the sort of "compacts" nullified by the Federal constitution. In *Davis Wholesale Grocery* v. *Martin*, 278 Ky. 705, it was held that a reciprocal agreement between Ohio and Kentucky for the exchange of data contained in sales tax reports was not a prohibited "compact between States." "There are

many matters upon which different States may agree that can in no respect concern the United States." (*Virginia* v. *Tennessee*, 148 U.S. 503.) In the latter case, the court said, at page 519: "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."

Consideration of these and other pertinent authorities impels the conclusion that the Federal constitutional interdiction of "interstate compacts" was written into the organic law of the land in order to protect a then nascent republic from such *ententes* among powerful States as would aggrandize their political power at the expense or the compromise of national sovereignty. The provision does not inhibit those purely fiscal interstate agreements that facilitate interstate commerce and aid in execution of internal revenue policies. This is particularly true when such agreements conduce to, rather than restrain, commerce among the several States.

Defendants contend that only nonresidents from States that do not have reciprocity can challenge the act on the ground that it discriminates against them and that none of plaintiffs are members of this class. This contention is unsound. Where, as here, the suit is brought by a taxpayer under the statute governing injunctive proceedings to restrain the disbursement of public moneys, (Ill. Rev. Stat. 1951, chap. 102, pars. 11-16,) we have held that the validity of a statute may be challenged by a taxpayer even though he is not, and does not claim to be, subject to the provisions of the act or to be affected by its provisions except as a taxpayer. *Krebs* v. *Thompson*, 387 Ill. 471.

The plaintiffs' contention that the agricultural exemption contained in section 9 is unconstitutional is not well taken in view of the long line of decisions consistently holding valid, both under State and Federal constitutions, such provisions similar to those under consideration. *Brashear Freight, Inc.* v. *Hughes*, 26 Fed. Sup. 908; *Aero Mayflower Transist Co.* v. *Georgia Public Service Com.* 295

U.S. 285; *Hicklin* v. *Coney*, 290 U.S. 169; *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, 76 L. ed. 1155, 52 S. Ct. 595.

The contention of plaintiffs that section 20 of the act is a violation of the commerce provision of the Federal constitution has been passed upon by numerous decisions of the Supreme Court and is not well taken, and therefore will not be discussed at length. *Storaasli* v. *Minn.* 283 U.S. 57, 75 L. ed. 839, 51 S. Ct. 354; *Hendrick* v. *Maryland*, 235 U.S. 610; *Kane* v. *New Jersey*, 242 U.S. 160; *Hicklin* v. *Coney*, 290 U.S. 169; *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542; *Aero. Mayflower Transit Co.* v. *Georgia Public Service Com.* 295 U.S. 285.

Other questions are raised by plaintiffs and other contentions appear in the briefs of *amici curiae*. A complete answer to most of them can be found in the authorities previously considered and principles of law emphasized in this opinion.

The General Assembly took legislative cognizance, and we take judicial notice, not only of the increase in cost of all types of construction since the early days of the automobile, but, likewise, that modern trucks and busses are much heavier, travel much faster, and are far more numerous than they were in those early days. The heavy cost of maintaining the State's arteries of transit must be borne by someone. The General Assembly could, as it did, place a large share of this burden of expense upon those who own and operate such heavy vehicles as trucks and busses. This it did by a constitutionally permissible exercise of the legislative faculty. It is not for the judiciary to interfere with that exercise when the scheme of classification is not unreasonable and when the contemplated revenues, though great, are not greater than the cost of the highways involved. It cannot be said that a tax on the privilege of using the highways is unreasonably high when that tax does not even equal the total cost of their maintenance.

The Motor Vehicle Law of Illinois, as amended, is constitutional and the decree of the trial court is reversed.

Decree reversed.

LIBRARY
SUPREME COURT, U.S.

No. 187

Supreme Court of the United States

WILLIAM E. BODE, *et al., Plaintiffs-Appellants,*

vs.

EDWARD J. BARRETT, as Secretary of State of the State of Illinois, *et al., Defendants-Appellees.*

Appeal from the Supreme Court of Illinois.

BRIEF OF PLAINTIFFS-APPELLANTS IN ANSWER TO STATEMENT OF APPELLEES OPPOSING JURISDICTION AND IN ANSWER TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

SCOTT W. LUCAS,
CHARLES A. THOMAS,
Attorneys for Petitioners, William E. Bode; Isaac Sandridge, R. E. Sponsler, Archie Prather, Leonard Dudleston, Joe C. Feger, Everett Florence, Buell Ford, Manford MacPherson, and John F. Hagan and Thomas F. Hagan, a partnership doing business as Hagan Coal Company.

HUGH J. GRAHAM, JR.,
Springfield, Illinois,
GEORGE C. HOFFMANN,
Springfield, Illinois,
Of Counsel,

Address:
231 S. La Salle St.,
Chicago, Illinois.

July 8, 1952.

Supreme Court of the United States

WILLIAM E. BODE, *et al., Plaintiffs-Appellants,*

vs.

EDWARD J. BARRETT, as Secretary of State of the State of Illinois, *et al., Defendants-Appellees.*

Appeal from the Supreme Court of Illinois.

BRIEF OF PLAINTIFFS-APPELLANTS IN ANSWER TO STATEMENT OF APPELLEES OPPOSING JURISDICTION AND IN ANSWER TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

INTRODUCTION.

The statement of appellees opposing jurisdiction makes a very incomplete summary of the position of appellants and considerable additional background is necessary to demonstrate the importance and the novelty of the questions presented by this appeal. However, appellants will first refute directly and in order the three positions asserted by appellees and will thereafter briefly comment upon the general aspects of this case.

REFUTATION OF POSITIONS TAKEN BY APPELLEES.

I.

A.

Appellees' Statement That Each of the Appellants Is Engaged Solely in Intrastate Operations Wholly Within the State of Illinois is:

(1) Plainly Erroneous in Fact.

(2) Plainly Based Upon a Misconception of the Law Applicable.

(1)

Some of Appellants Are Engaged in Interstate Operations.

(a) MANFORD MCPHERSON, pla' tiff-appellant, testified in part as follows:

> "I operate throughout the State of Illinois under a local carrier permit, specialized carrier permit, and merchant permit; we haul quite a bit of livestock to the Chicago Market and East St. Louis market *and some to St. Louis;* it is a seasonal hauling, but we haul considerable amount of apples and fruit, *some of which will go out of the State;* farm to market product *and it isn't passed by the Interstate Commerce Commission because it is farm to market"* (Record, p. 191, Abst. 79) and
>
> *"My transportation of cattle and hogs is either Chicago or St. Louis"* (Record, p. 196, Abst. 81).

(b) BUELL FORD, plaintiff-appellant testified in part as follows:

> "Q. What are the facts if any which would restrict the passing of any increase in rates? A. Well we have the farmers who use some of their trucks. Then we have the railroad companies, the G. M. & O. and the C. B. & Q.

"Q. Is there any competition from the neighboring states such as Missouri and Iowa? A. The Missouri trucks operate out of the St. Louis stock yards on the return of cattle and stuff like that. (Record 199, Abst. 82, 83.)

"Q. Individual owners would have to pay the same license fee for the same type of equipment would they not? A. We do hauling for farmers. They do their own work, yes, sir.

"Q. They have to pay a license fee for a truck at the same rate you pay? A. *But they hire you to haul to St. Louis and Chicago.*" (Record, p. 200, Abst. 83.)

(2)

Appellees' Position in the Matter of Questions of Interstate Commerce Is Plainly Based Upon a Misconception of the Law.

While Plaintiff-Appellants Have Shown in (1) Above That Defendants-Appellees Are Simply Wrong in the Statement of Fact As to the Two Plaintiffs Noted, the Issue Is Much Broader Than That.

(a) Illinois residents have just as much right to complain of a burden upon interstate commerce imposed by the State of Illinois as do residents of any other state.

The question is simply whether the commerce is burdened. While many other aspects of the burden are charged in the complaint and considered in the opinion of the Supreme Court of Illinois, the point made above is directly charged in paragraph 12 (b) of the complaint (Record 21, Abst. 16).

"The operation of the tax on 'resident' owners discriminates in favor of 'non residents' in interstate commerce where the state of the 'non-resident' exempts Illinois residents from its taxes."

Again in paragraph 9(b)(4) of the complaint (Record, p. 18, Abst. 13).

"Non-resident owners, where exemptions are given to Illinois residents, * * * may use the highways with the maximum permissible axle loads without payment for use e.g., *a St. Louis Missouri resident may operate between St. Louis and Chicago paying no tax. The same operation by a resident on the highest classification is $1,588.00 per truck. The basis is therefore 'ownership' by 'residents' and not 'use'.*"

(b) In this suit all taxpayers of Illinois are actual plaintiffs and the settled Illinois law permits challenge based upon evidence concerning those who do not actually appear and complain and the evidence clearly introduces varied situations in respect to the effect upon interstate commerce and this was considered by the Supreme Court of Illinois for the purpose of final decision in all respects as if these parties whose records were introduced were plaintiffs.

The decree of the Circuit Court of Sangamon County, Illinois contains the following (Record 64, Abst. 27):

"The Court further finds that this suit is properly brought in behalf of all citizens and taxpayers of the State of Illinois, that all such citizens and taxpayers are parties to this cause by virtue of the doctrine of class representation *and that all of them are bound by and entitled to the benefits of this decree.*"

The Supreme Court of Illinois recognized and used this evidence as follows (*Bode* v. *Barrett*, 412 Ill. 204 on 212 and 213):

"The plaintiffs introduced in support of their contentions the testimony of several truck operators of various classes *and a large volume of documentary evidence.* * * * To establish the low annual mileage of private and local carriers, the plaintiffs first introduced records of about ten operators in each of five different classes who had been operating under the mileage weight option showing an average annual mileage per private carrier of 3082 miles. The mile-

age records of several other truckers operating under the mileage weight option were also introduced, including those of 25 Chicago coal companies operating 108 trucks showing an annual average of 4232 miles per truck, and *eight interstate truckers records were introduced.* * * *"

By way of illustration certain of this evidence to which the Supreme Court of Illinois referred was as follows (taken from p. 20 of plaintiffs' brief, record reference here added):

"INTERSTATE MILEAGES

"The annual mileages for one truck traversed by typical Illinois truckers in interstate commerce are herewith shown:

Name	Illinois Mileages	Mileages Outside of Illinois	Abst. Ref.	Record
Loren Frederick	10,442	68,283	137	313
Richard C. Beachdel	1,190	50,830	137	313
Michael Krause	882	27,675	137	313
Ben Booker & Sim Booker	899	39,644	138	314
Harold Thibo	1,480	57,400	138	314
Lyle Thompson	2,468	49,173	138	314
George O. Thompson	2,534	42,082	138	314
Prentice Thomas	2,232	51,171	138	314
George O. Thompson	2,123	33,992	138	314
Paul F. Bestick	6,756	62,473	138	314
Robert Turner	2,041	57,442	138	314"

The foregoing is only a portion of the record devoted to this subject.

While of course the State of Illinois takes judicial notice of the laws of other states adjoining Illinois plaintiffs introduced exhibits setting forth vehicle license fees. Plaintiffs' Exhibit 79 Indiana, 80 Wisconsin, 81 Missouri and 82 Iowa. (Record, 374-400, not set forth in the abstract.)

The Supreme Court of Illinois held that the question of burden on interstate commerce was in issue in this case. *Bode* v. *Barrett*, 412 Ill. 204 on 208 and last par. 209. Also on p. 233 last paragraph which will be referred to under Points I B and II hereof.

The Supreme Court of Illinois by a curious failure to recognize the fact that in interstate commerce *every citizen has an equal right not to have such commerce itself burdened, said* in *Bode* v. *Barrett,* 412 Ill. 204 on p. 226.

> "If a state may thus tax non-resident owners with respect to interstate commerce, measuring the tax by the value of the privilege granted and disregarding the extent to which the privilege is availed of, *a fortiori* it may tax its own citizens for the privilege of using state highways without regard to how much or how little the licensees actually take advantage of the privilege conferred upon them."

The cases cited by appellees to-wit: *Southern Railway* v. *King,* 217 U. S. 524; *Missouri Kansas and Texas Ry.* v. *Cade,* 233 U. S. 642; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Hendrick* v. *Maryland,* 235 U. S. 610; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; *Tyler* v. *Judges,* 179 U. S. 405; *Smith* v. *Indiana,* 191 U. S. 138; *McCandless* v. *Pratt,* 211 U. S. 437; and *Miles* v. *Department of Treasury of Indiana,* 298 U. S. 640 are therefore all inapplicable upon the two grounds that,

(a) Some of the plaintiffs here are actually engaged in interstate commerce and claim a burden.

(b) The Supreme Court of Illinois has thoroughly considered the question and decided the issue on the basis of evidence submitted and the case is binding on Illinois residents and taxpayers engaged in interstate commerce.

I B. and II.

Appellees Completely Misconceive and Under Point I B Misstate the Position of Appellees as to the Asserted Burden Upon Interstate Commerce.

(1) On page 4 of appellees' statement appears the following:

> "There is no constitutional requirement that a difference in rate be made between the two classes of

carriers" (i.e. line haul carriers for hire and private truck owners).

At no point have plaintiffs-appellees made this contention. To use a popular phrase this issue claimed by appellees is simply a "straw man."

Plaintiffs-appellants do contend and the evidence so demonstrates and the Supreme Court of Illinois recognizes that there is an actual division of use.

Plaintiffs-appellants' position however is simply that the tax imposed bears no fair relation to the privilege granted.

First, there is no doubt that the Supreme Court of the United States has held repeatedly that a tax on interstate business must bear some fair relation to the use of the highway. *This is not some fiction of aggregate charges to all trucks intrastate and interstate and aggregate costs of the state.*

Second, there is no doubt either that the Supreme Court of Illinois in the case at hand (*Bode* v. *Barrett*, 412 Ill. 204) means by its decision that the only test is whether aggregate charges to all trucks equal aggregate expenses for highways.

As to the *first* point above the following from *Interstate Transit Co.* v. *Lindsey*, 283 U. S. 183 on p. 190 is squarely in point.

> "But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. *Clark* v. *Poor*, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, *supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of

> wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity to the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory.

"Reversed."

That a flat tax of over $1,000 on a truck that travels 1,480 miles in Illinois and 57,400 outside Illinois in a year (Record 314) bears no reasonable relation to use of the highways, when the same tax is imposed on intrastate operations by one truck or by an average of a fleet of trucks of 68,000 miles a year on Illinois roads (Record *364*) is beyond dispute.

In point is the following from *Sprout* v. *South Bend*, 277 U. S. 162 on 170.

> "A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

Also in point is the language of the concurring opinion in *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 174 on 181:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which charge is made."

Plaintiffs-appellants do contend that a private truck owner has a right to use the highway whereas the carrier for hire has a qualified right to use the highway.

Elkins v. *Schaaf*, 4 Wash. 2nd 12, 102 Pac. 230;
Dixie Ohio Express v. *State Rev. Com.*, 186 Ga. 228, 306 U. S. 72.
Stephenson v. *Binford*, 287 U. S. 251;

Plaintiffs-appellants do contend that a license tax must bear a reasonable relation to the use of the highway.

State ex rel. Atlantic Greyhound v. *Mizell*, 128 Fla. 125;
Interstate Transit Co. v. *Lindsey*, 283 U. S. 183;
McCarroll v. *Dixie Greyhound Lines*, 309 U. S. 176.

Plaintiffs' position is that the right to impose a tax so high as to prohibit use applies to an intrastate carrier for hire only.

The use cannot be prohibited to a private trucker and interstate commerce cannot be prohibited.

When the high flat tax (highest tax here $1,588.00 per truck) reaches a point that private use or interstate use is prohibited it is void. Plaintiffs *admit the tax may be the same if it does not destroy the right of the private truck owner or obstruct interstate commerce.*

The Supreme Court of Illinois considered the privilege of use a privilege without limit ignoring what it had already recognized: that there are the following limitations upon the possibility of use:

(1) Nature of the business.
(2) Legal restrictions on operations.
(3) Division between local and interstate use.

The decision of the Supreme Court of Illinois made the test of reasonableness *solely* the *aggregate charge to all*

trucks balanced against the cost of maintaining highways. It said in *Bode* v. *Barrett*, 412 Ill. 204 on p. 255:

> "It cannot be said that a tax on the privilege of using the highways is unreasonably high when that tax does not even equal the total cost of their maintenance."

Plaintiffs' position, to repeat, is that the class of private truck owner and local carrier has a right which cannot be discriminated against or taxed out of existence and so also of interstate commerce. No other case has presented this issue to the Supreme Court of the United States and no state decision has been so sweeping as the one at hand.

The use of the *Mangano* case (*Mangano* v. *Hamilton*, 292 U. S. 40, 78 L. ed. 1109, 54 S. Ct. 599) to justify destruction of interstate commerce is wholly unjustified. (*Bode* v. *Barrett*, 412 Ill. 204 on 226-7). The *Mangano* case, *Veazie Bank* v. *Fenno*, 8 Wall 533, 19 L. Ed. 482 and the *McCray* case, 195 U. S. 27, 49 L. Ed. 78, 24 S. Ct. 769 are all most exceptional cases *and do not purport to define the power of a state to destroy interstate commerce.* Two of the cases are the butter substitute (*Oleo Margerine*) cases. The *Veazie Bank* case is the tax on state bank notes.

The only case that in any remote degree sustains the position of the Supreme Court of Illinois is *Eavey Co.* v. *Dept. of Treasury*, 216 Ind. 255. In that case plaintiff did not question the amount of the tax. The maximum tax there ($400.00) was about one-fourth of the maximum tax here ($1,588.00). The maximum taxes under statutes in cases cited by the Court were $18, $10, $200, 1 cent per mile interstate, $75 (held invalid) $400, $7.50, $75, $25, $15, 2% of value, $70, and $400. *In none of the cases upholding the statute was the amount of the tax questioned;* only the formula or application of the tax was questioned.

With private carriers averaging 4,000 miles as against 60,000 miles for line haul carriers and as against even smaller mileage of interstate carriers in Illinois the tax for the private carrier and interstate carrier is thirty times as

much per mile notwithstanding the private trucker has an absolute right to the road and the line haul carrier (except interstate) may be totally denied the right.

Plaintiffs rely upon:

Interstate Transit, Inc. v. *Lindsey*, 283 U. S. 183;
Sprout v. *South Bend*, 277 U. S. 163;
McCarroll v. *Dixie Greyhound*, 309 U. S. 176;
Central Greyhound v. *Mealey*, 334 U. S. 653;
Western Livestock v. *Bureau*, 303 U. S. 250;
Standard Oil Co. v. *Peck*, 342 U. S. 382.

It is not our purpose here to show the full application of these cases which can be done only in extended briefs but to show clearly the federal question involved.

To summarize plaintiffs' position is that there is a prohibitive burden upon certain classes of commerce by motor vehicle and discrimination between certain classes of commerce by motor vehicle.

(2) Section 20 of the 1951 Illinois Motor Vehicle Amendment Both Creates a Burden Upon and Discrimination in Reference to Certain Kinds of Interstate Commerce and Violates the Prohibition Concerning Agreements and Compacts Among the States.

This section authorizes the Secretary of State to enter into reciprocal agreements with responsible officers of other states where "like privileges" are granted citizens of this state.

The question as here presented has never before been tested.

The Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204 held that the section does not:

(1) Impose a burden on interstate commerce (p. 234).

(2) Violate the prohibition against agreements between the states without the consent of congress. (p. 231-34).

The Appellees in the Supreme Court of Illinois, as here, raised the question whether plaintiffs were in a position to raise the question.

There are two answers to appellees' position.

First, the Supreme Court of Illinois said (*Bode* v. *Barrett,* 412 Ill. 204 on 233).

> "Defendants contend that only non-residents from states that do not have reciprocity can challenge the Act on the ground that it discriminates against them and that none of the plaintiffs are members of this class. This contention is unsound. Where, as here, the suit is brought by a taxpayer under the statute governing injunctive proceedings to restrain disbursement of public moneys (Ill. Rev. Stat. 1951 Chap. 102 Pars. 11-16) we have held that the validity of a statute may be challenged by a taxpayer even though he is not, and does not claim to be, subject to the provisions of the act or to be affected by its provisions except as a taxpayer. *Krebs* v. *Thompson,* 387 Ill. 471."

Second, as previously pointed out plaintiffs Manford McPherson and Buell Ford are engaged in interstate commerce. Additionally, the court considered the other documentary evidence and testimony on the question of interstate commerce.

There Was Introduced in Evidence in This Case the Actual Status of Reciprocity Under the Various Agreements Between the State of Illinois and Other States.

Plaintiffs' Exhibit 58 is the official compilation for use by the Secretary of State of the State of Illinois and by Motor Users as a guide to administration of the Act. (Record 349, Abst: 185).

The introduction states that it is a guide for enforcement officers.

The official character and the authenticity of this document is not challenged.

Various pertinent questions were raised and answered in plaintiffs' brief, pp. 88-94. Here plaintiffs will merely indicate the types of problems presented.

Is the authority of the Secretary of State confined to allowing *all* vehicles from a particular state or refusing *all* vehicles if *all* Illinois vehicles are there exempt? Or may the Secretary of State enter an agreement exempting trucks and taxing trailers? Can the Secretary of State distinguish carriers though the taxing Act itself does not e.g., allow exemption to irregular route operators and disallow to regular route operators?

Plaintiffs' Exhibit 58 shows what agreements have been reached. (Record 349.)

With relation to Arizona there is full reciprocity on passenger cars and no reciprocity on trucks (Ex. 58, p. 7).

With relation to California, there is *full reciprocity for California vehicles in Illinois.* But Illinois vehicles in California must pay *an equalization fee of 3% of gross business done in California.* (Ex. 58, p. 9.)

With relation to Colorado, there is reciprocity on trucks as to license plates only. The flat or mileage tax must be paid. (Ex. 58, p. 10.)

With relation to Iowa there is a division between "Regular Route Operators" and "Irregular Route Operators". The former pay full taxes. The latter have full reciprocity. (Ex. 58, p. 18.)

With relation to Nebraska, there is full reciprocity, *except vehicles burning fuel oil.* The excepted vehicles pay the taxes. (Ex. 58, p. 30.)

With relation to Oklahoma there is full reciprocity on farm trucks, commercial trucks, truck tractors, trailers and semi-trailers.

With relation to South Carolina there is no reciprocity on regular schedule vehicles for hire. There is full reciprocity for irregular operators and operators hauling their own products. (Ex. 58, p. 43.)

With many states there is no reciprocity.

In general there are 17 states which have no reciprocity with Illinois.

So long as Illinois had the mileage weight election (normally used by interstate truckers who had no reciprocity)

prior to the 1951 Illinois Amendment here in question, all hardships which might have resulted were modified by enabling the payment of a tax somewhat apportioned to the use of the highways. The same principle would be true if a gross receipts tax or any tax geared in some fair way to use of the highways were in effect.

While plaintiffs maintain under *Holmes* v. *Jennison*, 14 Pet. U. S. 540 on 571 that the reciprocity agreements are a direct violation of Article I, Section 10 of the United States Constitution, the underlying complaint of course is the burden upon interstate commerce.

Iowa, Missouri, Wisconsin, and Indiana have much lower taxes than Illinois. In fact no state has a tax within hundreds of dollars of the highest Illinois tax. In appropriate briefs charts demonstrating the effect of these differences will be submitted.

The operation is illustrated thus:

A truck owner licensed in a state which has reciprocity with Illinois pays a tax of $200.00 for the regular run from Chicago to St. Louis. An Illinois operator pays $1,000.00 for the same operation in direct interstate competition. An operator from another non-reciprocal state pays the tax of the state of domicile and other taxes en route and the Illinois tax of $1,000.00.

The Illinois Supreme Court cited *Interstate Trucking Co.* v. *Damman*, 208 Wis. 116 and *Brashear Freight Lines* v. *Hughes*, 26 Fed. Supp. 908 as authority to support a section authorizing such agreements. The agreements were not authorized at the time of the *Brashear* case. The *Wisconsin* case is authority for the plaintiffs. There the court said the authority did not necessarily contemplate a contract varying in terms, etc. *Here Plaintiffs' Exhibit 58 demonstrates the actual operation on interstate commerce.* Also the Wisconsin statute prohibited reciprocity agreements on vehicles for hire.

The other authorities cited by the Supreme Court of Illinois to-wit, *Kane* v. *New Jersey*, 242 U. S. 160; *Staraalsi*

v. *Minn.*, 283 U. S. 57; *Hendrick* v. *Maryland*, 235 U. S. 610; *Hicklin* v. *Coney*, 290 U. S. 169; *Capitol Greyhound* v. *Brice*, 339 U. S. 452; *Aero Mayflower Transit* v. *Georgia Public Service Com.*, 295 U. S. 285 are of no assistance in this case. The fees are all much lower or insignificant. The actual effect of interstate agreements was not involved. Discrimination between trading areas was not claimed or shown.

The evidence in this case as to the agreement, the variations in use by classes of user, the arbitrary distinctions between classes of commerce and the extremely burdensome tax distinguish it from anything previously presented to this court.

Plaintiffs earnestly submitted to the Supreme Court of Illinois that the history of the Confederation having been one of tariff walls, competing currencies and export and import barriers was one of the compelling reasons for the change from the Articles of Confederation to the Constitution of the United States.

All of the Complaints Concerning Trade Barriers and Discrimination in Interstate Commerce Could Be Eliminated by a Tax Which Bears Some Fair Relation to Actual Use of the Highways.

This requirement is not satisfied by finding that the aggregate of trucks of all kinds pay no more than the aggregate costs of maintaining highways.

III.

The Alleged Violations of the Fourteenth Amendment Are Substantial.

While considerable analysis is required to demonstrate the method in which the evidence taken together with recognized principles of law prove the arbitrary character of this legislation, a few may be noted to show the questions involved.

The Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204 on 208 and 209 stated the claimed violations of the

Fourteenth Amendment. These pertain to the lack of relation between the tax and the privilege granted, the failure to have any consistent theme of classification, the omission of classes, the confusion of classes and the failure to define terms.

(a) Specifically no tax is provided for a four wheel or two axle vehicle between 30,000 and 36,000 pounds. The Supreme Court of Illinois held in *People* v. *Patton*, 338 Ill. 385 that no conviction could be had for operation of a vehicle without a license where none was provided by the Act. This is therefore an omitted class.

(b) The agricultural exemption is so confusing that it is impossible to determine from the language what the legislature intended. This section after stating that various vehicles used primarily in agricultural pursuits of the owner such as trucks, tractors, trailers, and semi-trailers are exempt says:

> "but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers or semi-trailers engaged in transporting agricultural products."

It is not possible to determine whether any *actual* transportation is taxable or only that by those *engaged in the business* of transporting agricultural products. *The point is not: can you exempt agriculture; but what has the legislature done?*

(c) An equally glaring defect is created by sections 9 (i-3) and 9 (i-4). Section 9 (i-3) provides for 8 or more wheel vehicles over 50,000 lbs. Section 9 (i-4) provides for 10 or more wheel vehicles over 50,000 and under 72,000 lbs. The first section calls for a $1,245.00 tax and the second for a $1,588.00 tax. Any vehicle having ten or more wheels also has eight or more wheels. Any vehicle over 50,000 lbs. and under 72,000 lbs. is also a vehicle over 50,000 lbs. Which tax should a 59,000 lb. 10 wheel vehicle pay? The Courts to which this has been submitted have not attempted to answer the difficulty.

(d) Tables were submitted to show that no consistent theme of classification obtained on weight, wheels, axles or types of vehicles or any combination of the same.

(e) In reference to the contention that "Maximum load" was not defined the Supreme Court of Illinois found that it meant what the owner declared he "intended to carry", which plaintiffs seek to demonstrate, by brief, is untenable.

It was further contended that the arbitrary character of the Act and the delegation of power has a direct bearing upon the flow of interstate commerce because the arbitrary character of the Act cannot be separated from its effect upon interstate commerce.

Conclusion of Response to Statement of Appellees Opposing Jurisdiction.

The Supreme Court of Illinois has recognized the federal questions involved and has passed upon such questions in a manner binding upon all unless reversed.

The procedure here used is specifically approved by the law of Illinois.

It would be a monstrous result to hold that questions legitimately presented to and passed upon and treated as binding by all should be kept from the tribunal having the final authority by some pretense that the questions were not actually raised.

If more were needed counsel for the appellees have asserted as a matter of record that these federal questions were raised and thoroughly examined by the Supreme Court of Illinois.

In the case of Coordinated Transport Inc. of Illinois v. *Edward J. Barrett, et al. No. 32400 in the Supreme Court of Illinois, May Term 1952, the Attorney General of Illinois in the Brief and argument for appellants, pages 8 and 9 says:*

"Here the trial court by its decree found the 1951 Act to be violative of Section 8 of Article I and Sec-

tion 1 of Amendment XIV of the Constitution of the United States * * * a reference to the opinion in the *Bode* case demonstrates that the plaintiffs there specifically assailed the 1951 Act under each of the above mentioned constitutional provisions. *This court* (Supreme Court of Illinois) *after a most comprehensive consideration of all aspects of the Constitutionality of the 1951 Act under both state and federal constitutions concluded its opinion by saying:*

> " 'The Motor Vehicle Law of Illinois as amended is constitutional and the decree of the trial Court is reversed.' "

No other authority was cited than the case of Bode v. *Barrett, 412 Ill. 204 to demonstrate that the law did not violate either the commerce clause or the 14th Amendment in the Attorney General's Brief in the Coordinated Transport case above.*

There is no doubt whatever that the case of *Bode* v. *Barrett* (412 Ill. 204) now before this court will be treated as conclusive of the questions presented by this appeal.

Other Considerations Impelling This Court to Retain Jurisdiction.

The attempt to mollify the effect of this high flat tax by statement that a consideration of the gasoline tax revenues is pertinent misses the entire effect of the imposition.

The economic effect of the tax is the final test. Plaintiffs agree with the Supreme Court of Illinois that the formula is not important but the effect of the imposition is vital.

A high flat tax economically is comparable to a high rent. A gasoline tax is comparable to an occupation tax measured by sales. One might as well contend that a tax of $1,588.00 to make one sale in Illinois was equalized by the fact that everyone also paid an occupation tax of 2% based on sales. Clearly the more use one can make of the roads in Illinois on a flat tax the less will be his contribution per ton-mile of freight. The theory of $.00251 per ton mile mentioned

by the court obviously cannot apply to a carrier hauling ten tons into Illinois for 1,000 miles at a tax of $1,000.00. Obviously the tax is ten cents per ton mile.

The test is: Will the imposition of the tax create such a burden as to affect the movement of commerce in a substantial way? Will it stop some classes of commerce? Will it favor others?

The Supreme Court of Illinois has chosen to adopt the broadest view possible,—that the state may prohibit commerce by whole classes of carriers. Plaintiffs say this is the very thing the state may not do.

Because of the sweeping decision of the Illinois Court which recognizes the factors and says such factors are immaterial, this Court is asked by the plaintiffs to adhere to the principles formerly announced by this Court and recognized by all that there is a limitation upon the taxing power of the state in such matters and that the fee imposed must somehow be related to the commerce itself and not merely to the total revenue of the state and the total expenditures of the state.

This decision of the Supreme Court of Illinois also approves creation of trading areas within the nation by agreements between the states and the policy therein announced should be corrected by this court. The harmful effects of the abuse of reciprocity would fall away with the adoption of a tax which bears some fair relation to the use of the facility granted by the classes of trade and commerce which use the facility.

In the assignment of errors plaintiffs-appellants suggested that the principles adopted by the Supreme Court of Illinois were so sweeping that the Supreme Court of the United States might find it advisable to reverse and remand to the Supreme Court of Illinois for further proceedings. Plaintiffs-appellants respectfully suggested the precedent of *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, in the event this court should find that by adopting an incorrect

principle, the Supreme Court of Illinois had failed to consider sufficiently the evidence.

Respectfully submitted,

SCOTT W. LUCAS,

CHARLES A. THOMAS,

Attorneys for Petitioners, William E. Bode, Isaac Sandridge, R. E. Sponsler, Archie Prather, Leonard Dudleston, Joe C. Feger, Everett Florence, Buell Ford, Manford MacPherson, and John F. Hagan and Thomas F. Hagan, a partnership doing business as Hagan Coal Company.

HUGH J. GRAHAM, JR.,
Springfield, Illinois,

GEORGE C. HOFFMANN,
Springfield, Illinois,
Of Counsel,

Address:
231 S. La Salle St.,
Chicago, Illinois.

July 8, 1952.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 12 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 187

WILLIAM E. BODE, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF THE STATE OF ILLINOIS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

SCOTT W. LUCAS,
CHARLES A. THOMAS,
JACK ARNOLD WELFELD,
Counsel for Appellants.

HUGH J. GRAHAM, JR.,
Of Counsel.

INDEX.

	PAGE
Brief for Appellants	1
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Summary of Argument	9
Argument	10
I. The 1951 Amendment Established an Oppressive, Unreasonable and Discriminatory Tax Against Private Carriers Wholly Unrelated to Use	10
II. Section 20 of the Act Violates Article 1, Section 8 of the Constitution of the United States and Amendment XIV, Section 1 of the Constitution of the United States	14
III. The 1951 Amendment Constitutes an Unlawful Delegation of Legislative Power	15
IV. The Supreme Court of Illinois Did Not Consider the Constitutional Requirement That a Substantial Tax for Revenue Must Bear a Reasonable Relationship to the Use of the Highway	20
Conclusion	25

Table of Cases Cited.

Aero Mayflower Transportation Co. v. Georgia Public Service Commission, 295 U. S. 285 22

Capitol Greyhound Lines v. Brice, 339 U. S. 542 ..... 12, 19, 22, 23

Clark v. Poor, 274 U. S. 554 21

Dixie Ohio Express v. State Revenue Commission, 186 Ga. 228, 306 U. S. 72 ..... 11, 21, 22

Eavey Co. v. Dept. of Treasury of Indiana, 216 Ind. 255 22

Hendrick v. Maryland, 235 U. S. 610 ..... 11, 17

Hicklin v. Coney, 290 U. S. 169 22

H. P. Welch v. State, 89 N. H. 428, 306 U. S. 79 ..... 13, 21

Ingels v. Morf, 300 U. S. 90 18

Interstate Busses Corp. v. Blodgett, 276 U. S. 245 21

Interstate Transit Corp. v. Lindsey, 283 U. S. 183 ..... 13, 18

Kane v. New Jersey, 242 U. S. 160 ..... 21, 23

Kreds v. Thompson, 387 Ill. 471 7

McCarroll v. Dixie Greyhound Lines, 309 U. S. 176 25

Morf v. Bingaman, 298 U. S. 407 ..... 22, 24

Ott v. Mississippi Valley Barge Lines, 336 U. S. 169 ..... 13, 24

People v. Deep Rock Oil Co., 343 Ill. 388 11

Pullman Car Co. v. Pennsylvania, 141 U. S. 18 13

Pure Oil Co. v. Oklahoma Tax Commission, 179 Okla. 479, 302 U. S. 635 ..... 13, 21

Prouty v. Coyne, (D. C. S. D.) 55 F. (2) 289 18

Sprout v. South Bend, 277 U. S. 163 18

Standard Oil Co. v. Peck, 342 U. S. 382 24

Western Livestock v. Bureau, 302 U. S. 350 18

Wisconsin v. J. C. Penney Co., 311 U. S. 435 13

STATUTES CITED.

Illinois Revised Statutes, 1951, Ch. 102, Pars. 11-16... 2, 7

Illinois Revised Statutes, 1951, Ch. 95½, Sec. 9, 10(a). 3

Sec. 36 of Motor Vehicle Law, Ill. Rev. Stat. Ch. 51, Ch. 95½, Sec. 50..... 10

Act to Amend Sections 9, 11a, and 20 and to Repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the "Motor Vehicle Law," approved June 30, 1919, as Amended (Laws of Illinois 1951, Page 1147)..... 2, 7

Constitution of the United States Cited:

Article I, Section 8.....2, 6, 17

Article I, Section 10.....2, 6, 15

Fourteenth Amendment, Section 1..... 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 187.

WILLIAM E. BODE, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF THE STATE OF ILLINOIS, ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

I.

THE OPINION IN THE COURT BELOW.

The opinion in the Supreme Court of Illinois is reported in 412 Illinois Reports, 204; 106 North Eastern (2d) 1952, and appears at pages 268-293 of the Record.

II.

JURISDICTION.

Jurisdiction to review this case is based upon Subsection (2) of Section 1257 of Title 28 of the Judicial Code of the United States.

III.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Supreme Court of Illinois sustaining the validity of the 1951 Motor Vehicle Law of Illinois. The appellants brought an action in the Circuit Court of Sangamon County, Illinois, as citizens and taxpayers of the State of Illinois on behalf of themselves and all other taxpayers of the State pursuant to the Statute (Ill. Rev. Stat. 1951, Ch. 102, Pars. 11-16) authorizing suits in equity by taxpayers in proper cases to restrain the reimbursement of public money by officers of the State and to enjoin such officers from expending public funds in the administration or enforcement of the Act. The complaint alleged that the statute was unconstitutional and void in that it violated certain provisions of the Constitution of the State of Illinois, as well as Article 1, Sec. 8; Article 1, Sec. 10; and Amendment XIV of the Constitution of the United States (R. 1-18).

The Circuit Court of Sangamon County, Illinois, after hearing the evidence, declared unconstitutional and void the Act of the 67th General Assembly, approved by the Governor of Illinois on July 9, 1951 entitled, "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k, and 9l of the 'Motor Vehicle Law' approved June 30, 1919, as amended," and enjoined and restrained the Secretary of State, the Auditor of Public Accounts, and the Treasurer of the State of Illinois from expending public funds in the administration and enforcement of said Act.

Prior to the enactment of the Amended Motor Vehicle Law, hereinafter sometimes referred to as the 1951 Amendment, the Illinois Motor Vehicle Law provided flat taxes

for motor vehicles carrying goods and carrying more than seven passengers. In addition thereto, it also provided for an optional mileage tax based on the amount of use of the highways. Under the former provisions of the Act the highest flat tax imposed was $420 (Ill. Rev. Statutes 1951, Ch. 95½, Secs. 9 and 10a).

The Statute in question (Laws of Illinois, 1951, p. 1147) imposed a substantially increased flat tax, the highest tax being $1134 for 1952 and 1953, and $1588 for 1954 and succeeding years. The Statute, likewise, repealed the mileage option provisions which formerly existed and changed some classifications while omitting other classes of vehicles, such as non-freight carrying vehicles and 4 wheel freight-carrying vehicles varying in weight from 30,000 to 36,000 pounds. A new class of 2 axle busses operating entirely within a single municipality or a single municipality and municipalities contiguous thereto, "or a close radius thereof" was subjected to a substantially lower tax. While the 1951 Act contained an agricultural exemption, as did the former Act, it also created new classes assessing different taxes where such classes by very definition are indistinguishable (Secs. 9 (i-3) and 9 (l-4)).

The 1951 Amendment further exempts vehicles from states having reciprocity with the State of Illinois as well as authorizing reciprocal agreements. Semi-trailers, under the Act, are treated as one vehicle with the tractor unit, except that additional semi-trailers are licensed at $5 per annum. The taxes are based upon the weight of a vehicle and its maximum load, although this latter qualification is nowhere defined nor is there any relation between the tax assessed and the amount of highway use.

In paragraph 6(d) of the original complaint, the petitioners raised the issue of the repugnancy of this Statute to the Constitution of the United States (R. 7). The Con-

stitutional issue as well as the effect of the Act on Interstate Commerce was clearly recognized throughout the opinion of the Supreme Court of Illinois (R. 268-293).

The imposition of a substantially increased and graduated tax based upon weights and bearing no uniform relation to the use of the particular taxpayer or its vehicle to the highways is the result achieved under the new Act with the repeal of the optional mileage provisions thereof. A resident of the State of Illinois hauling his own products to market for sale would pay a substantially high tax, whereas a commercial non-resident carrier operating from a State having a reciprocal agreement with the State of Illinois would pay no tax at all. Had the optional mileage features of the Act been retained, this discrimination would not exist.

IV.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Illinois erred in holding that the state may impose a burden or obstruction upon interstate commerce by exacting high flat annual taxes on trucks and busses engaged in such commerce based upon the relation between total fees collected and total cost of the highways as distinguished from the established basis of a reasonable relation of the tax upon users and classes of users to the privilege of using such highways.

2. The Supreme Court of Illinois erred in holding that the state may extend its confiscatory and prohibitory powers as to use of the highways (a power commonly held to extend to prohibition of carriers for hire who have only a privilege of use), to persons engaged in interstate commerce who carry their own property and have a right to use the highways.

3. The Supreme Court of Illinois erred in holding that the state may impose prohibitory privilege taxes on use of the highways irrespective of whether such highways are built and maintained solely by the State of Illinois or jointly with the United States and without regard to whether such privilege taxes bear any reasonable relation to use of the highways by persons engaged in interstate commerce.

4. The Supreme Court of Illinois erred in ignoring the evidence as to difference in use of the highways by different classes of carriers engaged in interstate commerce and in ignoring differences in use engendered by natural facts such as the limitation upon agricultural hauling and in ignoring legal restrictions upon use of highways by different classes of carriers.

5. The Supreme Court of Illinois erred in holding that the high flat annual tax (top tax $1,588) may lawfully be imposed upon some persons engaged in interstate commerce and may at the same time completely exempt other persons of the same type engaged in the same interstate commerce over the same route, in holding that residents of Illinois and residents of the 17 states with which the State of Illinois has no reciprocity must pay the tax whereas residents of states with which the State of Illinois has reciprocity need not pay any tax no matter how much use is made of Illinois roads, and notwithstanding that the highest tax in such other states varies greatly and in most cases is several times lower than that of Illinois.

6. The Supreme Court of Illinois erred in holding that the authority given to the Secretary of State of Illinois to enter into reciprocal agreements with other states and shown to have been exercised by entering agreements of varied kinds (*e. g.* giving free operation to California vehicles in Illinois, although Illinois vehicles pay 3% of

gross revenue earned in California, distinguishing reciprocity as to kinds of fuel used by vehicles, distinguishing operation as to irregular or scheduled route) amounted merely to recognizing existing facts and did not constitute an interference with interstate commerce and did not constitute the entering of an agreement or compact among the states without the consent of congress in violation of the prohibitions in Sections 8 and 10 of Article I of the Constitution of the United States.

7. The Supreme Court of Illinois erred in overruling the contention of appellees that the operation of the Act on trucks from 17 non-reciprocal states is an obstruction to interstate commerce and that the act inevitably creates "trading areas" and "trade barriers" resulting from different treatment of persons depending solely on their domicile, route, or the discretion of a secretary of state in violation of the letter and spirit of Section 8 of Article I of the Constitution of the United States.

8. The Supreme Court of Illinois erred in holding that a state may tax its own citizens for the privilege of use of the highways without regard to how much or how little licensees take advantage of the privilege conferred in thus ignoring the law that citizens of Illinois have as much right to protection in respect to interstate commerce as to citizens of any other state.

9. The Supreme Court of Illinois erred in denying petitioners-appellees' contention that the Act creating the tax ignored the most obvious division as to use of highways by motor vehicles, that is to say, the difference in use between the class of fixed route, scheduled, line haul common carriers and the class of private truck owner, local carrier, contract carrier, and specialized carrier, and:

(a) bears no fair relation to the privilege granted, and

(b) has no other consistent theme of classification, in

consequence whereof it is discriminatory and arbitrary (and confiscatory as to some) in violation of the XIVth Amendment to the Constitution of the United States.

10. The Supreme Court of Illinois erred in denying petitioners-appellees' contentions that the operation of the law in the omission of classes of vehicles, the creation of a class operating in a municipality or municipalities "or a close radius thereof" without defining the terms, basing the tax on "maximum load" without defining the same, the creation of an indefinite agricultural exclusion, and the creation of other confusing and indefinite classifications constituted a denial of due process and equal protection of the law in violation of the XIV Amendment to the Constitution of the United States.

11. The Supreme Court of Illinois erred in denying petitioners-appellees' contention that the statute in question resulted in a cumulative burden on interstate commerce.

12. The Supreme Court of Illinois erred in failing to hold the Act to amend Sections 9, 11a and 20 of the Motor Vehicle Law and repeal other Sections stated therein (Laws of Illinois 1951 p. 1147) unconstitutional and void as contrary to Sections 8 and 10 of Article I of the Constitution of the United States.

13. The Supreme Court of Illinois erred in failing to hold the Act to amend Sections 9, 11a and 20 of the Motor Vehicle Law and to repeal other sections stated therein (Laws of Illinois 1951 p. 1147) unconstitutional and void as contrary to the XIVth Amendment to the Constitution of the United States.

14. The Supreme Court of Illinois, although holding that all questions presented were properly raised by petitioners under its own holding in *Krebs* v. *Thompson*, 387 Ill. 471 (concerning Ill. Rev. Stat. 1951, Chap. 102, pars. 11-16),

referred to in the opinion in the case herewith appealed from, did also err by reason of the erroneous holdings concerning the rights of the petitioners under the Constitution of the United States in failing to examine into the full effect of the statute in question upon various classes of highway users both in interstate and intrastate commerce for the reason that said court held such matters to be immaterial.

SUMMARY OF ARGUMENT.

1. The 1952 Amendment to the Motor Vehicle Law of Illinois established unreasonable and discriminatory taxes wholly unrelated to the use or privilege granted.

2. Section 20 of the 1951 Amendment violated Amendment 14 of the Constitution of the United States by discriminating against certain parties and by creating a burden on interstate commerce.

3. The 1951 Amendment constitutes an unlawful delegation of legislative power in that it authorizes the administrative officers to determine which vehicles operate within a close radius for tax purposes, and in permitting nonresident interstate carriers to operate their vehicles tax free while resident local carriers are required to pay oppressive taxes.

4. The Supreme Court of Illinois failed to consider the constitutional requirement that a substantial tax for revenue must bear a reasonable relationship to the use of the highway.

ARGUMENT.

Point I.

THE 1951 AMENDMENT ESTABLISHED AN OPPRESSIVE, UNREASONABLE AND DISCRIMINATORY TAX AGAINST PRIVATE CARRIERS WHOLLY UNRELATED TO USE.

The Motor Vehicle Law of Illinois classifies vehicles under Section 2 of the Act into two divisions. The first division embraces vehicles designed for carrying less than seven passengers while the second division consists of vehicles used for carrying more than seven passengers and vehicles for hauling freight, such as trucks, tractors, busses, trailers, and the like.

The optional mileage feature introduced by the 1935 Amendment to the Motor Vehicle Act was repealed by the Act now under consideration. Prior to the 1951 Act, this provision enabled a licensee thereunder to be taxed by the number of miles actually travelled within the state. Vehicle operators thus had the option of paying such a tax, which was directly related to the specific amount of use of the highways, or, in the alternative, could pay a license fee under the annual flat tax rates. These license fees were required to be placed in a special "road fund" to be used for the construction, maintenance, and patrolling of the Illinois Highway System (Sec. 36 of the Motor Vehicle Law, Ill. Rev. Stat. 51, Ch. 95½, Sec. 36).

In substance, the 1951 amendment to the Motor Vehicle Law brought about three distinct changes:

1. A substantial increase as of January 1, 1952, in the annual flat license fees for vehicles of the second division with provision for further increases as of January 1, 1954.

2. Repeal of the optional mileage weight tax.

3. Creation of a new classification of two axle busses with shock absorbers subject to Illinois Commerce Commission Regulation operating in municipalities or a close radius thereof, with no substantial license increase as to such classification.

It is noteworthy that throughout its opinion, the Supreme Court of Illinois alludes to and recognizes the fact that there must be a reasonable relation between a tax and the privilege granted, namely, the use and enjoyment of the highways. In support of such proposition, the court stated,

> "There was no constitutional inhibition against more than one privilege or excise tax where the total does not exceed reasonable taxation for the privilege enjoyed. It is incumbent upon plaintiffs to show that the aggregate charge bears no reasonable relation to the privilege granted. *People* v. *Deep Rock Oil Corp.*, 343 Ill. 388" (R. 279).

Again, adopting the language of *Hendrick* v. *Maryland*, 235 U. S. 610, which the court refers to as the leading case on the right of the State to tax motor vehicles in interstate commerce,

> "* * * The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce * * *" (R. 280).

Although the Supreme Court of Illinois cited the case of *Dixie-Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, as authority for the proposition that to sustain the validity of a tax it is not essential to show that its proceeds be actually appropriated to highway purposes or that its use of the highways is not enough to warrant the tax if the privilege therefor is sufficient, it should be

noted that the tax was necessarily required to be a reasonable compensation for the privilege of using the highways. Moreover, the tax involved in that case was $75 for the heaviest weight with lesser rates of tax for vehicles not used for hire. Noteworthy of mention, also, is the fact that the State Supreme Court of Georgia in the *Dixie-Ohio Express Co.* case found that a rational basis for the classification readily appeared (186 Ga. 228, 235).

In *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, cited in the opinion of the Supreme Court of Illinois (R. 283), there was no question raised as to the reasonableness of compensation for road use nor was the tax imposed an annual tax, but merely applied to busses wherein the formula rather than the amount of the tax was being challenged. In a vigorous dissent by Mr. Justice Frankfurter and Mr. Justice Jackson, it was pointed out that the constitution has and usually requires a valid formula and a reasonable tax.

Certainly, the exorbitant increase brought about by the 1951 Act bears no relation to the principles enunciated in the above decisions and this Amendment must necessarily fail because it imposes arbitrary and discriminatory taxation.

Under the principles of due process where a tax is imposed for revenue purposes such tax must bear a fair relationship to the general character of the use of a highway, and this failure to recognize the basic differences in the average mileages of different classes of users necessarily renders the 1951 Amendment unconstitutional and void.

Since the private carrier has an absolute right to the use of the highways and a carrier for hire has a qualified and restricted use, such differences must be recognized if the validity of this tax is to be sustained. Many farmers, small

merchants and truckers travel only 3,000 miles annually, whereas common carriers travel as much as 90,000 miles annually, yet the latter under reciprocal agreements, are afforded the use of Illinois highways tax free while the former, who already have paid an *ad valorem* tax on their farm, store, or factory, pay an exorbitant tax under this amendment. Such disparity is not easily reconciled with the requirements of due process of law.

There is no doubt that a common carrier may be taxed at a higher rate than a private carrier. See *H. P. Welch Co.* v. *State*, 89 N. H. 428, 306, U. S. 79; *Pure Oil Co. v. Oklahoma Tax Commission*, 179 Okla. 479, 302 U. S. 635. Similarly, this Court has approved the imposition of a mileage tax proportioned to the use of a highway. *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183.

Prior to the 1951 Amendment, the highest tax under the Act was $420, while it is now $1588, nearly 400 per cent greater. The optional mileage tax provided an alternative tax which obviated the discriminatory result now existing and its repeal completely obliterated any safeguards against unreasonable taxation under the 1951 Amendment.

In *Ott* v. *Mississippi Valley Barge Lines, Co.*, 336 U. S. 169, this Court reiterated the doctrine of tax apportionment applicable to the rolling stock of railroads in interstate commerce, formulated in *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; Mr. Justice Douglas speaking for the Court, at page 174, stated:

> "So far as due process is concerned, the only question is whether the tax in practical operation, has relation to opportunities, benefits, or protection conferred or afforded by the taxing state; see *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444, those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the state."

It thus becomes apparent that no taxing body may impose arbitrary and discriminatory taxes which bear no relationship to the use so taxed. An examination of the charts appended to the record in this case (R. 218-225) setting forth the variation in the amount of taxes imposed on vehicles of the same weight bears out this principle and clearly demonstrates the repugnancy of this Statute.

Point II.

SECTION 20 OF THE ACT VIOLATES ARTICLE 1, SECTION 8 OF THE CONSTITUTION OF THE UNITED STATES AND AMENDMENT XIV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES.

The petitioners contend that the XIVth Amendment of the Constitution is violated by Section 20 of the 1951 Act in the following respects:

1. The operation of the tax on "non-residents" whose states require Illinois residents to pay taxes results in a cumulative burden upon Interstate Commerce and a discrimination between carriers in Interstate Commerce.

2. The operation of the tax on "resident" owners discriminates against "residents" in favor of "non-residents", in Interstate Commerce where the State of the "non-resident" exempts Illinois residents from its taxes.

3. Unless exemption of non-resident owners offers the alternative of a mileage set basis or other out basis, it will discriminate against parties engaged in Interstate Commerce depending upon where such parties do business.

4. Section 20 of the Act discriminates against foreign corporations, partnerships or individuals "doing business in the State" in favor of those not "doing business in this State" and discriminates in favor of foreign corpora-

tions doing business in the State and against residents in Interstate Commerce and otherwise.

5. Section 20 of the Act creates a cumulative burden on Interstate Commerce as to many carriers from States where no reciprocity is allowed.

6. Section 20 enables the Secretary of State of Illinois to arbitrarily impose a burden on Interstate Commerce as to classes of vehicles and types of commerce.

Section 10, Article I of the Constitution of the United States forbidding compacts and agreements without the consent of Congress by authorization and execution of reciprocal agreements is further violated in that it creates trading areas and trade barriers as well as infringement of the authority of Congress in reference to an economic policy existing since the inception of the Constitution. A further burden on Interstate Commerce arises as a result of the arbitrary disarrangement and confusion in Interstate Commerce brought about by the classification under the 1951 Amendment. A substantial burden on Interstate Commerce further results from a cumulative effect of taxes imposed by non-reciprocal States since no method is provided for establishing a fair relationship between the use of the highways, the license charge therefor and the Interstate Commerce carried on by the individual trucker or class of truckers.

Point III.

THE 1951 AMENDMENT CONSTITUTES AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

The 1951 Amendment to the Motor Vehicle Act created a new classification for two axle busses by Section 9(1)(7):

"Two axle vehicles which are designed and used for transporting more than seven passengers entirely

within the territorial limits of a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:"

There follows this schedule:

12,000 to 14,000 pounds	$ 45.00
14,000 to 16,000 pounds	70.00
16,000 to 20,000 pounds	105.00
20,000 to 24,000 pounds	145.00
24,000 to 36,000 pounds	195.00

Any bus which can qualify for this class will pay the same tax that it is now paying on the above weights while the tax on all other vehicles, except semi-trailers, increases substantially in 1952, 1953 and again in 1954. The word "municipality" is wholly indefinite and tantamount to practically complete discretionary action by the administrative officer. Similarly, there is no standard by which the administrative officer shall construe the term "or a close radius thereof". The Act does not provide whether a close radius shall be deemed to cover an area of 3 miles, 5 miles or 50 miles, nor does it specify whether "close radius" refers to a close radius of the original municipality or of the contiguous municipalities. The significance of the issue raised by this terminology is this. If a 31,000 pound bus is within the "close radius" of the "municipality", the tax is $195 whether it has four wheels or six wheels on its "2 axles". If the bus is not within a "close radius" or a "municipality" the tax is $545, if it is a four wheel vehicle and $810 if it is a six wheel vehicle. This is much more than a minor administrative rule for it delegates authority to an administrative office to vary the tax from $195 to $810 on the same vehicle.

This was an intentional classification and as such affects the whole classification for tax purposes.

The 1951 Amendment further constitutes an unlawful delegation of legislative power which is prohibitive, in that it authorizes the Secretary of State to enter into agreements with other States, permitting the operation of vehicles without registration or the paying of permit fees or flat taxes. There is no valid basis for establishing the right of an interstate carrier to enjoy the use of Illinois highways without compensating the State for the benefits thereof, while a resident operating only a fractional portion of the mileage in contrast to the Interstate carrier should be subjected to a tax so great that he cannot afford to operate his vehicle. Had the optional mileage features of the Act been retained this discrimination would not result. It was therefore incumbent upon the legislature to provide for either a mileage weight election or some other formula fairly related to the use of the vehicle on the highways.

Section 20 of the 1951 Act further violates Section 8 of Article I of the Constitution of the United States by authorizing agreements between States without the consent of Congress.

A statute which creates a competitive advantage to one over another where each is in the same business is the essence of unconstitutional arbitrary discretion. The non-resident carrier from a non-reciprocal State suffers the same competitive disability as Illinois resident carriers in contrast to non-resident carriers from reciprocal States. While it has already been established that a non-resident cannot be more heavily taxed than a resident carrier, since a tax must bear a reasonable relation to the privilege of use granted (See *Hendrick* v. *Maryland*, 235 U. S. 610), the converse of such a situation now exists; the non-resident pays no tax in Illinois while the resident carrier pays an exorbitant tax to maintain the highway for his competitor. This burden upon Interstate Commerce resulting from the

1951 Amendment could have been obviated had the mileage weight provisions of the prior enactment been retained.

In *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, involving a tax on a passenger carrier for hire amounting to $500 where a maximum tax for the class was $750, this Court declared such a tax invalid on the ground that it was a tax on the privilege of engaging in Interstate business and not as compensation for the use of the highways. Again in *Ingels* v. *Morf*, 300 U. S. 90, a freight tax of $15 for 90 days was declared invalid as excessive in amount for regulatory purposes. These taxes were inconsequential in comparison to the prohibitive taxes imposed by the 1951 Amendment. The new Illinois law fails to provide any fair relationship between the amount of the tax and the use of the highways.

In *Prouty* v. *Coyne* (DC.-S. D.), 55 Fed. (2) 289, where calculated fees ranging from $15 to $400 predicated upon weights were involved, the Court said:

> "In the instant case it appears that a number of plaintiffs engaged in Interstate Commerce make only occasional and infrequent trips though necessary over the South Dakota highways, yet are required under the Statute to pay the same amount of tax, if such trips exceed 4 in number as those who may be constantly using the highways. As to those engaged in Interstate Commerce, the Act would be held unconstitutional". *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Sprout* v. *South Bend*, 277 U. S. 163.

In *Western Livestock* v. *Bureau*, 302 U. S. 350, this Court stated at page 255:

> "The vice characteristic of those (taxes) which have been held invalid is that they have placed upon the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citing cases) or added to (citing cases) with equal right by every State which the commerce touches, merely because interstate

commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce (citing cases)."

In the recent opinion of this Court in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, the appendix (p. 561) sets forth an analysis of decisions involving the taxation of motor vehicles in interstate commerce by the various States. Eleven of the 15 decisions which were held valid involved taxes of $10, $18, $200, 1¢ per mile, 5/10ths mill per gross ton mile, $15, $25, $75, $400 and $15 and $25 respectively for periods of six months. The two cases involving the largest amounts ($200 and $400) were imposed upon carriers for hire. In Illinois, under the 1951 Amendment, the tax upon carriers for hire and not for hire has a top bracket of $1,588, so that it appears that none of the States have ever enacted a tax as exorbitant as the one now in existence and operating indiscriminately upon carriers for hire and not for hire whether in intrastate or interstate commerce.

To demonstrate the absence of any rational basis for the oppressive increases brought about by the 1951 Amendment, we need only to look at the following examples:

Harold Thibo, a trucker (59,000 pound truck) travelling 1,480 miles within the state and 57,400 miles out of state paid a flat tax of $48.30. Under the 1951 Amendment he will be required to pay a tax of $1,245.00; representing a percentage increase of 2577% (R. 138; Pl's. Ex. 68, at p. 219).

Hillard Waller (G and W Truck Lines), a non-resident contract carrier operating three trucks, one of which weighed fifty thousand pounds, paid a tax of $8.80 under the former Act, for two trips into the State of Illinois; under the present law that tax will be $1,098.00, representing an increase of 12477%. On two forty-one thousand pound vehicles operated by Waller, he paid $9.00 and $8.80, respectively, on two trips to Illinois, whereas under the

new Act his taxes will amount to $890.00 on each of such vehicles, representing an increase of 9888% and 10113%, respectively (R. 170, 172; Pl's. Ex. 68 at p. 219). These increased taxes must be paid even though Waller makes only one trip into the State of Illinois. It must be borne in mind that Waller, an interstate contract carrier, enters the State only pursuant to the request of some shipper. Nevertheless, he is subjected to the burdensome and oppressive taxes outlined herein.

Point IV.

THE SUPREME COURT OF ILLINOIS DID NOT CONSIDER THE CONSTITUTIONAL REQUIREMENT THAT A SUBSTANTIAL TAX FOR REVENUE MUST BEAR A REASONABLE RELATIONSHIP TO THE USE OF THE HIGHWAY.

The Illinois Supreme Court erroneously concluded that so long as the amount of taxes imposed did not exceed the cost of constructing and maintaining the highways, it was not burdensome, oppressive or discriminatory. Such a theory evades and abandons the constitutional requirement that a substantial tax must bear a reasonable relationship to the use of the highway by the class of the user.

The private carrier has an absolute and inherent common law right to the use and enjoyment of the highways. Such a right cannot be made the subject of confiscatory, oppressive, discriminatory and burdensome license fees, even though the total of such taxes collected therefrom is not in excess of the amount required to maintain a highway system. To hold otherwise would be wholly inconsistent with the constitutional requirements of due process of law. The absolute right of a private carrier to use the highways is so fundamentally rooted in our system of free enterprise that many states wholly exempt such classes and elect to place the entire burden of the cost of highway maintenance upon common carriers for hire. Since this latter class does

not pay an *ad valorem* or property tax within the state, but carries the goods of others exclusively for hire, this has been deemed a privilege, subject to restriction or even abolishment. See *Dixie-Ohio Express Co.* v. *State Revenue Commission, supra; Pure Oil Co.* v. *Oklahoma Tax Commission, supra; H. P. Welch Co.* v. *State, supra.* The taxes imposed against carriers for hire must not be arbitrary or in excess of the cost of constructing and maintaining the highways, but must be fairly uniform. Since the carrier for hire has a qualified or restricted use of the highways, it is taxed for the privilege of doing business, and as such the tax imposed may be burdensome and oppressive, in contrast to such taxes as are imposed upon private carriers. Frank M. Barker, Chief Highway Engineer of the Department of Public Works and Buildings, a witness for the State, testified that damage to roads was not taken into consideration (R. 109).

A review and examination of the authorities cited in the opinion of the Supreme Court of Illinois does not sustain the view that the tax under the 1951 Amendment is either constitutional or reasonable. In *Hendrick* v. *Maryland,* the tax range varied from $6 to $18 and the question involved therein pertained to the regulatory power of a state to require the licensing of all vehicles and the issuance of certificates for limited use to interstate carriers. *Kane* v. *New Jersey,* 242 U. S. 160, involved a tax for the use of facilities which varied from $3 to $10. *Clark* v. *Poor,* 274 U. S. 554, sustained the imposition of an extra tax against carriers for hire and although the amount was not in issue, the tax therein concerned varied from $20 to $200. In *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, interstate passenger carriers for hire were taxed at one cent a mile and while the formula differed from the previous 3% of the gross receipts levied on intrastate carriers, no great disparity was shown and hence it was held

constitutional. In sustaining the tax imposed in *Hicklin* v. *Coney,* 290 U. S. 169, on carriers for hire moving in interstate commerce, it should be noted that the tax varied from $30 to $400, was not questioned, and the opinion sustained the exemption of farmers and dairy men who occasionally but not regularly transport farm and dairy products for compensation. *Morf* v. *Bingaman,* 298 U. S. 407 sustained a permit fee of $5 to $7.50 for vehicles transported for sale whether towed or driven. A lower tax for vehicles not for hire was sustained in *Dixie-Ohio Express Co.* v. *State Revenue Commission, supra.*

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 295 U. S. 285, an annual fee of $25 on contract carriers for hire was approved as moderate and reasonable, even though such carriers did not use the highways as much as other carriers in local business. The more recent case of *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, held that the formula of a tax need not be constitutional so long as the amount did not exceed fair compensation for the use of the road. The tax therein was 2% of the value of the vehicle, nor was that issue involved since the tax was not unreasonable in amount.

The only case cited by the Supreme Court of Illinois that would seem to lend any support to its position is *Eavey Co.* v. *Department of Treasury of Indiana,* 216 Ind. 255. There, the court upheld a tax imposed upon resident private carriers in interstate business at the same rate as that which was imposed upon carriers for hire. The court adopted the view that while a private carrier could be exempted, the State was not precluded from taxing it with carriers for hire. On appeal, the case was dismissed for want of a substantial federal question.

It is submitted that this case is not controlling and is readily distinguishable upon the following grounds: no

evidence was introduced of the mileage travelled by the plaintiff; there was no showing as to the use of the highway by the private and the common carrier; the amount of the tax paid was not shown, nor was it challenged. Unlike Illinois, the highest tax that could have been imposed under the Indiana law was $400, which has since been amended to provide a maximum tax of $200 on trucks and $300 on tractor semi-trailers. A review of the foregoing cases aptly demonstrates that the amount of tax imposed was not in issue but rather was the formula or application of the tax challenged. Moreover, the taxes in the preceding cases were relatively small in contrast to the $1,588 imposed under the 1951 Amendment on both private and common carriers. While we recognize that a regulatory tax may be justified upon all carriers as a class, nevertheless, when a substantial tax for revenue is imposed it must bear a reasonable relationship to the character of the use.

We submit that the 1951 Amendment constitutes legislation devoid of a rational basis. The petitioners' challenge thereto is predicated upon the ground that the amount of the tax imposed is in excess of fair compensation for the privilege of using the Illinois highway system. See *Capitol Greyhound Lines* v. *Brice, supra.* Regardless of the benefits Illinois resident carriers are afforded by other states under reciprocal agreements, a tax on the resident farmer or other small trucker hauling his own products to market over short distances cannot be sustained where it is so oppressively high as to bear no relationship to the privilege granted.

This Court, in the *Brice* case, referring to *Kane* v. *New Jersey,* 242 U. S. 160, at page 545, stated:

> "* * * that so long as fees are reasonable in amount, it is clearly within the discretion of the State to determine whether the compensation for the use of its

highways by automobiles shall be determined by way of a fee, payable annually, or semi-annually, or by a toll based on mileage or otherwise.

* * * a flat fee on the privilege of using the highways 'is not a forbidden burden on interstate commerce' unless 'unreasonable in amount'." *Morf* v. *Bingaman,* 298 U. S. 407, 412.

Again, at page 545 of the *Brice* opinion, this court stated:

"The Maryland tax based on the cost of the vehicle should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted."

Without laboring the point, suffice it to say, that this court in cases involving very nominal taxes has never departed, but on the contrary, has consistently held that the reasonableness of a tax to the privilege or use granted is decisive in these matters.

It is conceded, *arguendo,* that the fact that a tax is so high as to discourage, prevent or even force a licensee thereunder from carrying on his business, does not, of itself, invalidate the tax. However, where the tax is so unreasonable as to have no rational basis by way of its relation to the use or privilege granted, that tax must necessarily fail.

In *Standard Oil Co.* v. *Peck,* 342 U. S. 382, the doctrine of apportioning taxation was restated under the authority of *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169. Here, the tax was declared invalid upon the ground that it was not fairly apportioned to the commerce carried on within the State of Ohio, for the barges sought to be taxed by the State of Ohio were almost continuously outside of the State during the taxable year and hence,

could be taxed by the several states on an apportionment basis.

In *McCarroll* v. *Dixie-Greyhound Lines*, 309 U. S. 176, vehicles entering the state carrying fuel in their tanks for their own consumption were required to pay a tax of 6.5¢ per gallon on gasoline in excess of 20 gallons. The tax was held invalid upon the ground that the formula bore no reasonable relation to the use. Mr. Justice Brandeis, speaking for the court, at page 181, stated:

> "It must appear upon the face of the Statute that the tax as laid is measured by or has some fair relationship to the use of the highway for which the charge is made."

CONCLUSION.

In conclusion we respectfully submit that the Supreme Court of Illinois has in effect held by its decision that the well established precedents that a tax must bear a relationship to the use granted is unnecessary, since the factor of reasonableness is only important as it bears relation to the total revenue; that differences in classes as well as the type of operation are unimportant; and indiscriminate and oppressive taxation without regard to these factors is judicially sanctioned.

The decision of the Supreme Court of Illinois, if permitted to stand, will grant administrative officers the exclusive right of imposing or refusing to impose taxes upon certain interstate and intrastate carriers, by their determination of what area shall constitute "within a close radius".

It is, therefore, respectfully submitted that this court should reverse the decision of the Supreme Court of Illinois and sustain the findings of the Circuit Court of Sanga-

mon County, Illinois, declaring the 1951 Amendment to the Motor Vehicle Law of Illinois unconstitutional.

Respectfully submitted,

SCOTT W. LUCAS,
CHARLES A. THOMAS,
JACK ARNOLD WELFELD,
Counsel for Appellants.

HUGH J. GRAHAM, JR.,
Of Counsel.

Office Supreme Court, U. S.
FILED
JUL 9 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 187

LIBRARY
SUPREME COURT, U.S.

WILLIAM E. BODE, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IVAN A. ELLIOTT,
Attorney General of Illinois,
Counsel for Appellees.

JOHN T. CHADWELL,
Special Assistant Attorney General;
FRANK M. PFEIFER,
Special Assistant Attorney General,
Of Counsel.

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
The appeal herein is without merit there being no substantial federal question involved	2
The claimed unlawful burden upon interstate commerce	2
The claimed violation of Section 10 of Article I of the United States Constitution	6
The claimed violation of the Fourteenth Amendment	7
Conclusion	9

Table of Cases Cited

Aero-Mayflower Transit Co. v. *Georgia*, 295 U.S. 285	4, 5
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542	5
City of Newport v. *Merkel Bros.*, 156 Ky. 580, 161 S.W. 549	6
Clark v. *Paul Gray, Inc.*, 306 U.S. 583	3
Dixie Wholesale Grocery Co. v. *Martin*, 308 U.S. 609, 278 Ky. 705, 129 S.W. 2d 181	6
Dixie-Ohio Express Co. v. *State Revenue Commission*, 306 U.S. 72	4
Eavey Co. v. *Dept. of Treasury of Indiana*, 310 U.S. 611, 216 Ind. 255, 25 N.E. 2d 268	4
Fort Smith v. *Scruggs*, 70 Ark. 549, 69 S.W. 679	6
Hendrick v. *Maryland*, 235 U.S. 619	3, 7
Kane v. *New Jersey*, 242 U.S. 160	7
Lillard v. *Melton*, 103 S.C. 10, 87 S.E. 421	6
Massachusetts v. *Mellon*, 262 U.S. 447	3
McCandless v. *Pratt*, 211 U.S. 437	3
Miles v. *Department of Treasury of Indiana*, 298 U.S. 640, 209 Ind. 172, 199 N.E. 372	3
Mississippi v. *Lawrence*, 108 Miss. 291, 66 So. 745	6

Page

Missouri, Kansas and Texas Ry. v. *Cade*, 233 U.S. 642 3
Saint Louis & San Francisco Railway Co. v. *James*, 161 U.S. 545 7
Schuler, Ex parte, 167 Cal. 282, 139 Pac. 685 6
Smith v. *Indiana*, 191 U.S. 138 3
Southern Railway Co. v. *King*, 217 U.S. 524 ..... 2, 3
Storaasli v. *Minnesota*, 283 U.S. 57 6
Tyler v. *Judges*, 179 U.S. 405 3
Vermont v. *Caplan*, 100 Vt. 140, 135 Atl. 705 6
Virginia v. *Tennessee*, 148 U.S. 503 ..... 6, 7

Statutes and Authorities Cited

Constitution of the United States:

Article I, Section 8 ..... 2, 6, 7
Article I, Section 10 ..... 6, 7
Fourteenth Amendment 8
Illinois Motor Vehicle Law, Section 20 5
Illinois Revised Statutes 1951, Chapter 102, Paragraphs 11-16 3
Illinois State Constitution 3
Indiana Gross Income Tax Act of 1933 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 187

WILLIAM E. BODE, ET AL.,

Plaintiffs-Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.,

Defendants-Appellees

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Come now Edward J. Barrett, as Secretary of State of the State of Illinois, Benjamin O. Cooper, as Auditor of Public Accounts of the State of Illinois, and William J. Stratton, as State Treasurer of the State of Illinois, appellees in this cause, and file their statement in opposition to appellants' statement as to jurisdiction and hereby move the Court (1) to dismiss the appeal herein or (2) in the alternative, to affirm the judgment of the Supreme Court of Illinois, from which judgment said appeal is taken. In support of the foregoing appellees specify the following:

The Appeal Herein Is Without Merit There Being No Substantial Federal Question Involved

Appellees urge that the appeal herein is without merit for the reason that the facts in this case and the decision of the Supreme Court of Illinois do not present any substantial federal question requiring review by this Court. The violations of the United States Constitution claimed by appellants may conveniently be divided into three categories which will be discussed separately.

I

The Claimed Unlawful Burden Upon Interstate Commerce

A

There is no party before this Court entitled to challenge the Illinois statute upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution. Each of the appellants is a resident of Illinois engaged solely in intrastate operations wholly within the confines of Illinois. Hence, appellants are not within the class of interstate vehicle operators as to whom the unconstitutional burden is claimed to exist. Consequently they are not entitled to rely upon the commerce clause in this Court. In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (page 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade,* 233 U. S. 642, 648; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *Hendrick* v. *Maryland,* 235 U. S. 610, 621; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 595-596.

The Supreme Court of Illinois held that appellants had standing in that Court to challenge the validity of the tax under the commerce clause of the Federal Constitution because an Illinois statute (Ill. Rev. Stat. 1951, Chap. 102, pars. 11-16) permits suits by taxpayers to restrain disbursement of public moneys in connection with the enforcement of a state law alleged to be unconstitutional. The Supreme Court of Illinois then proceeded to a determination on the merits adverse to appellants' contention. However, that form of qualification of a litigant to raise a question of constitutionality in a state court does not serve to give the party a right to raise the constitutional question in this Court. Despite the fact that a state court may pass upon the merits of a constitutional question, the appellant, to be entitled to a review by this Court, must show that he is directly and personally aggrieved by the statute. This the appellants here cannot do. *Tyler* v. *Judges,* 179 U. S. 405, 410; *Smith* v. *Indiana,* 191 U. S. 138; *McCandless* v. *Pratt,* 211 U. S. 437; *Southern Railway Co.* v. *King,* 217 U. S. 524.

A case directly in point is *Miles* v. *Department of Treasury of Indiana,* 209 Ind. 172; 199 N. E. 372 (appeal dismissed 298 U. S. 640), where appellants brought an action as taxpayers on behalf of themselves and others similarly situated to enjoin state officials from paying out state funds for the printing of the Gross Income Tax Act of 1933 on the ground that the statute was violative of both the State and Federal Constitutions. The Supreme Court of Indiana considered the claims of unconstitutionality on the merits and upheld the validity of the Act. In dismissing the appeal this Court said (298 U. S. 640):

"The appeal herein is dismissed upon the ground that the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution. *Tyler v. Judges of Court of Registration,* 179 U. S. 405, 406, 407, 410; *Southern Ry. Co.* v. *King,* 217 U. S. 524, 534; *Standard Stock Food Co. v. Wright,* 225 U. S. 540, 550."

B

But aside from the fact appellants are in no position to urge a violation of the commerce clause, we believe it is obvious that, on the merits, their contentions have been denied by this Court in "decisions so precisely applicable alike in facts and in principle as to apply a closure to debate." *Aero-Mayflower Transit Co.* v. *Georgia,* 295 U. S. 285, 289. A reading of the opinion of the Supreme Court of Illinois and the appellants' assignments of errors and jurisdictional statement demonstrates clearly that appellants raise only issues which this court has previously decided adversely to their position. We will refer briefly to a few specific considerations.

First, appellants urge that the imposition of the same taxes upon carriers for hire and private carriers, i.e., persons engaged in carrying their own property, is unlawful. While it is true that a state if it wishes may lawfully tax carriers for hire at rates exceeding those imposed upon private carriers (*Dixie-Ohio Express Co.* v. *State Revenue Commission,* 306 U. S. 72) there is no constitutional requirement that a difference in rate be made between the two classes of carriers. *Eavey Co.* v. *Dept. of Treasury of Indiana,* 216 Ind. 255, 25 N. E. 2d 268; appeal dismissed for want of a substantial federal question, 310 U. S. 611.

Second, appellants contend that an unconstitutional burden is placed upon interstate commerce because the taxes imposed do not take into account or make allowance for the

difference in amount of use of the highways by various carriers and by different classes of carriers. Apparently it is appellants' contention that the amount of motor vehicle taxes must be geared directly to individual highway usage by means of a mileage tax or otherwise. This argument has been considered and uniformly denied by this Court. *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 289; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 547.

Third, appellants further argue that the provisions of Section 20 of the Illinois Motor Vehicle Law authorizing reciprocal agreements with other states impose an unlawful burden upon interstate commerce in that vehicles entering Illinois from reciprocal states are not taxed by Illinois whereas those from non-reciprocal states are taxed. Under Section 20 of the Motor Vehicle Law Illinois grants complete reciprocity to residents of other states provided such foreign states grant like privileges to residents of Illinois. It is obvious that the only persons having standing to urge that the imposition of Illinois taxes upon vehicle owners from non-reciprocal states amounts to an unlawful burden upon interstate commerce would be a resident of a state not maintaining reciprocal relations with Illinois. As we have seen, none of the appellants are in this class. Furthermore, even if a vehicle operator from a non-reciprocal state were an appellant in this case in order to prevail he would be required to establish that the Illinois taxes as applied to his interstate operations exceed fair compensation for the privilege of using the Illinois highways. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 547. Here appellants seek to have the Illinois Act delard unconstitutional merely by pointing to the requirement that non-residents from non-reciprocal states are taxed whereas non-residents from reciprocal states are not taxed without attempting to demonstrate the effect of the tax as applied to particular interstate carriers.

So far as we are aware no court has ever held similar reciprocal legislation to be invalid under the commerce clause. Similar contentions have been denied consistently. *Storaasli* v. *Minnesota*, 283 U. S. 57; *State* v. *Caplan*, 100 Vt. 140, 135 Atl. 705; *Lillard* v. *Melton*, 103 S. C. 10, 87 S. E. 421; *State* v. *Lawrence*, 108 Miss. 291, 66 So. 745; *City of Newport* v. *Merkel Bros.*, 156 Ky. 580, 161 S. W. 549; *Ex-Parte Schuler*, 167 Cal. 282, 139 Pac. 685; *Ft. Smith* v. *Scruggs*, 70 Ark. 549, 69 S. W. 679.

We submit (1) that appellants have no standing to urge in this Court that the taxes imposed by Illinois constitute an unlawful burden upon interstate commerce in violation of Section 1 of Article 8 of the Federal Constitution and (2) that, on the merits, appellants' contentions are foreclosed by prior decisions of this Court and hence present no question of substance requiring review of this Court.

II

The Claimed Violation of Section 10 of Article I of the United States Constitution

Appellants contended in the court below that Section 20 of the Motor Vehicle Law authorizing the Secretary of State to enter into reciprocal agreements with other states is violative of Section 10 of Article I of the United States Constitution which provides in part:

> "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . ."

We believe the frivolous nature of this contention is demonstrated by the opinion of the Supreme Court of Illinois wherein that court cited and relied upon *Dixie Wholesale Grocery Co.* v. *Martin*, 278 Ky. 705, 129 S. W. 2d 181 (Cert. den. 308 U. S. 609). See also, *Virginia* v. *Tennessee*,

148 U. S. 503, 519; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545, 562.

We feel certain this Court is aware of the fact that the great majority of states in the United States have enacted reciprocal legislation similar to the Illinois Act containing authorizations to their administrative officers to enter into reciprocal agreements with representatives of other states. So far as we have been able to ascertain no court has ever held such reciprocal legislation or the reciprocal agreements entered into pursuant thereto to be violative of the United States Constitution. On the contrary, this Court has considered motor vehicle acts containing reciprocal provisions similar to that of Illinois, and although the constitutionality of the reciprocal provisions was not specifically raised by the parties, this Court, with the law before it containing such provisions, upheld the validity of the entire Act. See *Hendrick* v. *Maryland*, 235 U. S. 610, 620-21. Also this Court has commented favorably with respect to such reciprocal legislation in *Kane* v. *New Jersey*, 242 U. S. 160, 168:

> "Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court."

III

The Claimed Violation of the Fourteenth Amendment

Appellants' assignments of error numbers 9, 10 and 13 are predicated upon a claimed violation of the Fourteenth Amendment. We submit that a mere reading of these assignments of error in the light of the opinion of the Supreme Court of Illinois demonstrates the frivolous

nature of the issues raised. The opinion of the Supreme Court of Illinois makes it apparent (1) that the taxes imposed by the 1951 amendment to the Motor Vehicle Law, when combined with motor fuel taxes, no more than equalize the taxes paid per ton-mile by truck, bus and trailer operators with those paid with respect to passenger cars and that such taxes have not been shown by appellants to exceed the fair value of the privilege granted, i. e., unlimited use of the Illinois highways; (2) that the exemption provisions of the law are fair and reasonable and of the type sustained by numerous decisions of this Court; and (3) that the law does not contain provisions so vague and indefinite as to amount to a delegation of legislative authority or a violation of the Fourteenth Amendment. In arriving at its decision the Supreme Court of Illinois cited and relied upon numerous decisions of this Court which conclusively establish that appellants' assignments of error under the Fourteenth Amendment are wholly lacking in merit and present no issue necessitating consideration by this Court.

Conclusion

WHEREFORE, we urge that this Court grant the aforesaid motion to affirm the opinion of the Supreme Court of Illinois or, in the alternative, to dismiss the appeal herein for the reason that no substantial federal question is presented requiring review by this Court.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of Illinois,
160 North La Salle Street,
Chicago, Illinois,
Attorney for Appellee.

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago 3, Illinois;

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

FILED
DEC 29 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 187

WILLIAM E. BODE, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLEES.

IVAN A. ELLIOTT,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.

Printed by Authority of the State of Illinois 2-52

INDEX TO SUBJECT MATTER.

	PAGE
Opinion and Report Below	1
Jurisdiction	1
Statement of the Case	2
Summary of Argument	6
ARGUMENT:	
I. Appellants have no standing to challenge the 1951 Act under the commerce clause	11
II. The 1951 Act does not impose an unlawful burden upon interstate commerce	14
III. The 1951 Act is not arbitrary or discriminatory in violation of the Fourteenth Amendment	25
IV. Section 20 of the Act is not violative of Section 8 or Section 10 of Article I or of Amendment XIV of the Constitution of the United States	29
V. The provisions of Section 9 of the 1951 Act relating to busses operating within municipalities or a close radius thereof do not constitute an unlawful delegation of legislative authority and are not subject to objection on the ground of indefiniteness	37
Conclusion	39
Appendix I. An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the "Motor Vehicle Law" approved June 30, 1919, as amended	i
Appendix II. A chart showing comparison of registration fees for trucks and busses of various gross weights	ix

Table of Cases.

Aero Mayflower Transit Company v. Georgia Public Service Commission, 295 U. S. 285 21
Aero Mayflower Transit Co. v. Railroad Commissioners, 332 U. S. 495 ..... 15, 21
Capitol Greyhound Lines v. Brice, 339 U. S. 542 ..... 14, 15, 16, 21, 22, 24
Carley & Hamilton v. Snook, 281 U. S. 66 26
City of Ft. Smith v. Scruggs, 70 Ark. 549; 69 S. W. 679. 31
City of Newport v. Merkel Bros. Co., 156 Ky. 580; 161 S. W. 549 31
Clark v. Paul Gray, Inc., 306 U. S. 583 ..... 13, 16, 22, 32, 38
Continental Baking Co. v. Woodring, 286 U. S. 352 ... 29, 38
Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72 22
Dixie Wholesale Grocery v. Martin, 278 Ky. 705; 129 S. W. 2d 181; cert. den. 308 U. S. 609 ..... 32, 33
Eavey Co. v. Dept. of Treasury of Indiana, 216 Ind. 255; 224 N. E. 2d 268; appeal dismissed 310 U. S. 611 ..... 27, 29
Ex parte Kessler, 26 Ida. 764; 146 Pac. 113 29
Ex parte Schuler, 167 Cal. 282; 139 Pac. 685 31
Hendrick v. Maryland, 235 U. S. 610 ..... 13, 21, 27, 32, 34, 38
Hicklin v. Coney, 290 U. S. 169 ..... 22, 36, 38
Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 ..... 35, 36, 38
Interstate Busses Corp. v. Blodgett, 276 U. S. 245 16
Kane v. New Jersey, 242 U. S. 160 ..... 27, 31, 34
Lillard v. Melton, 103 So. Car. 10, 87 S. E. 421 31
McCandless v. Pratt, 211 U. S. 437 13
Massachusetts v. Mellon, 262 U. S. 447 13
Miles v. Dept. of Treasury, 209 Ind. 172; 199 N. E. 372; appeal dismissed 298 U. S. 640 13
Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642 ... 13
Saviers v. Smith, 101 Ohio St. 132; 128 N. E. 269 29

Smith v. Indiana, 191 U. S. 138 13
Solberg v. Davenport, 211 Iowa 612; 232 N. W. 477 29
Southern Railway Co. v. King, 217 U. S. 524 .....12, 13
Sproles v. Binford, 286 U. S. 374 38
St. Louis & San Francisco Railway Co. v. James, 161 U. S. 545 34
State v. Caplan, 100 Vt. 140; 135 Atl. 705 31
State v. Lawrence, 108 Miss. 291; 66 So. 745 31
Storaasli v. Minnesota, 283 U. S. 57 30
Tyler v. Judges, 179 U. S. 405 13
Virginia v. Tennessee, 148 U. S. 503 33

CONSTITUTION OF THE UNITED STATES.

Article I, Section 10 32

STATUTES.

Laws, 59th G. A., 1935, page 1233 3
Ill. Rev. Stat. 1951, Chap. 95½:
Secs. 1 *et seq.* 2
Sec. 8 2
Sec. 9 (1) (7) 10
Sec. 22 29
Sec. 50 4
Secs. 240-282 11
Ill. Rev. Stat. 1951, Chap. 102:
Secs. 11-16 6
Ill. Rev. Stat. 1951, Chap. 120:
Sec. 417, *et seq.* 23
Sec. 418 .....17, 23
Sec. 424 .....17, 23
United States Code, Title 28, Section 1257 (2) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 187

WILLIAM E. BODE, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION AND REPORT BELOW.

The opinion of the Supreme Court of Illinois is reported in 412 Ill. 204; 106 N. E. 2d 521 and appears at pages 268-293 of the Record.

JURISDICTION.

Jurisdiction to review this case is based upon Subsection (2) of Section 1257 of Title 28 of the United States Code; Act of Congress June 25, 1948, c. 646 (2), 62 Stat. 929.

STATEMENT OF THE CASE.

This case concerns the validity, under the federal constitution, of an act of the Sixty-seventh General Assembly of Illinois approved by the Governor of Illinois on July 9, 1951 entitled "An Act to amend Section 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the 'Motor Vehicle Law' approved June 30, 1919 as amended". For the convenience of the Court we will hereinafter refer to the 1951 amendatory act as the "1951 Act" and we have attached to this brief as Appendix I a copy of the text of the 1951 Act.

As indicated by its title the 1951 Act was amendatory of the Illinois Motor Vehicle Law of 1919. We believe a brief outline of the history and nature of the basic Motor Vehicle Law will be helpful in appoaching a consideration of the issues in this case. The Motor Vehicle Law was first adopted in 1919 and, subject to various amendments subsequently adopted, remains in effect at the present time. (Ill. Rev. Stat. 1951, Chap. 95½, Secs. 1 *et seq.*)

By Section 2 of the law, motor vehicles are classified into two divisions. Those of the first division are defined as vehicles designed for carrying not more than seven passengers— i. e., passenger cars in the popular sense. The second division is comprised of vehicles designed for pulling or carrying freight, vehicles designed for carrying more than seven passengers and all vehicles not falling within the first division—in short, trucks, busses, tractors, trailers and the like.

From 1919 to date the Motor Vehicle Law has imposed a flat annual registration fee with respect to passenger cars graduated in accordance with the horsepower of the vehicle. (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 8.) The 1951

Act makes no increase or change in passenger car license fee rates and the same are not involved in this case.

Continuously since adoption of the Motor Vehicle Law in 1919 flat annual taxes have been imposed with respect to trucks, busses and other vehicles of the second division. Such taxes have at all times been based upon the gross weight of the vehicle and maximum load and have been graduated in accordance with weight brackets or classifications. By amendments adopted from time to time new weight brackets have been added, existing weight brackets revised and separate classifications and brackets established for special types of vehicles such as trailers and certain types of busses.

In 1921 Section 9a was added to the Act. This section imposed, in addition to the annual flat taxes, a tax on certain carriers for hire at the rate of one-half cent per mile for freight carriers and one-twentieth of a cent per mile per passenger seat for passenger carriers. In 1923 Section 9a was amended and thereafter until 1935 an annual tax, in addition to the annual flat taxes, was imposed upon certain types of carriers of passengers and freight for hire at the rate of $1.00 and later $1.50 per 100 pounds gross weight of vehicle and load. These additional taxes were imposed with respect to a limited class of carriers operating over fixed routes at fixed schedules of rates and the same were discontinued in 1935.

In 1935 the Motor Vehicle Law was amended to include for the first time a so-called optional mileage weight tax (Laws 59th G. A., 1935, p. 1233). This was a tax measured by the number of miles actually travelled in Illinois by the vehicle and graduated as to rates in accordance with the gross weight of the vehicle and load. Monthly reports and payments of tax were required. Vehicle oper-

ators were granted an option to register and be taxed under either the annual flat tax or under the mileage tax provisions. They were not required to pay both.

The Motor Vehicle Law has at all times specifically provided that all taxes upon vehicles of the second division were imposed "for the use of the public highways" of the State. (Appendix I, Section 9.) By Section 36 of the Motor Vehicle Law (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 50) all motor vehicle registration and license taxes collected are required to be set apart in a special "road fund" and used solely for construction, reconstruction, maintenance and patrolling of the public highways and administration of the Act.

The principal changes in the Motor Vehicle Law effected by the 1951 Act may be summarized, generally, as follows:

1. Effective January 1, 1952 the annual flat taxes for vehicles of the second division were increased with provision for further increases effective January 1, 1954.

2. The optional mileage weight tax was repealed thus subjecting all vehicles of the second division to the annual flat tax provisions.

3. Certain flat tax weight brackets were revised and new weight brackets added.

4. Separate weight brackets and tax rates were established for busses operating within municipalities or a close radius thereof.

We think it appropriate to point out here that the rate increases provided by the 1951 Act are the first significant or substantial increases in annual flat taxes on vehicles of the second division since the original enactment of the Motor Vehicle Law in 1919. For thirty-two years annual flat taxes on trucks, busses and trailers re-

mained at substantially the 1919 level. To illustrate these facts we have attached to this brief as Appendix II a chart indicating the weight bracket and corresponding rate changes which have occurred since 1919. Appendix II does not reflect the additional taxes imposed from 1921 to 1935 upon a limited class of carriers for hire nor does it reflect the optional mileage tax in effect from 1935 to 1952. The insignificance of these omissions for present comparative purposes is illustrated by the fact that in 1951 there were only 151 carriers of the class affected by the additional taxes in effect from 1921 to 1935. (R. 227, offered at R. 75). Obviously the class would have been much smaller in the earlier years 1921 to 1935. The small number of vehicles affected by the optional mileage weight tax is illustrated by the fact that in 1949 only 11,935 vehicles out of a total vehicle registration of 336,044 or about 3.5 per cent elected to pay the mileage tax rather than the annual flat tax. (R. 255, columns 1, 2 and 3, offered at R. 114, 115.)

SUMMARY OF ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under the commerce clause.

In the court below appellants challenged the validity of the 1951 Act under the commerce clause of the Federal Constitution. The Supreme Court of Illinois held that appellants had standing to raise this constitutional objection by virtue of an Illinois statute (Ill. Rev. Stat. 1951, Chap. 102, Secs. 11-16) permitting a representative suit on behalf of all taxpayers and decided the issue on the merits adversely to appellants' contention. The fact that the Illinois court decided this issue on the merits does not serve to qualify appellants to raise the issue in this Court. In this Court only those within the class as to whom the unconstitutional burden is claimed to exist may raise the objection. Appellants are all intrastate truckers and only three are also engaged in some interstate operations. An intrastate trucker pays no additional tax for engaging in interstate commerce and if he carried on no interstate operations he would still pay the same tax. Thus, no appellant is within the class of interstate carriers as to whom the unconstitutional burden is claimed to exist and no question concerning the validity of the 1951 Act under the commerce clause is properly before this Court.

II.

The 1951 Act does not impose an unlawful burden upon interstate commerce.

It is apparent from the face of the 1951 Act that it applies alike to interstate and intrastate commerce. Hence there is no discrimination against interstate commerce. The Illinois Supreme Court found as fact that the 1951 Act by its explicit terms imposes a tax on motor vehicles for the use of the Illinois highways and allocates all proceeds of the tax exclusively to highway purposes. Thus the tax is levied on the privilege of using Illinois highways and not on the privilege of doing an interstate business.

The court below found as a fact that the formula adopted by the Illinois General Assembly was based on a thorough study of Illinois highway needs which took into account the average annual mileage of different weight classifications of motor vehicles; further, that this formula equalizes on a ton-mile basis taxes paid by passenger vehicles and all other types of vehicles. Thus the formula has a rational basis.

A state may levy a flat annual tax on motor vehicles and need not gear such tax to vehicle mileage. The fee is for the privilege of a use as extensive as the carrier wills. But the 1951 Act should not be viewed alone. When the 1951 Act is considered in conjunction with the motor fuel tax it will be seen that the total tax paid by motor vehicle operators for the privilege of highway use does vary with actual miles travelled.

The tax is not excessive in amount. The total amount raised by the motor vehicle tax, together with the revenue raised by the motor fuel tax will produce only 60 per cent of the revenue needed by the State of Illinois for highway purposes, and the court below so found.

As applied to individual carriers the taxes imposed by the 1951 Act do not exceed fair compensation for the privilege granted since the privilege is an unlimited use of the state roads for the license period.

III.

The 1951 Act is not arbitrary or discriminatory in violation of the Fourteenth Amendment.

Appellants' contention that the 1951 Act is violative of the Fourteenth Amendment because not framed on the basis of a mileage tax is without merit under the decisions of this Court. In any event the taxes imposed by the 1951 Act are based upon a formula calculated to equalize the taxes paid by truck operators with those paid by passenger car operators on a ton-mile basis taking into account average annual mileage travelled by vehicles of various weight classifications.

Appellants' contention that to be valid a state motor vehicle tax law must afford lower rates of taxes to private carriers than those imposed on carriers for hire is without merit. Although a state, if it chooses, may impose higher taxes on carriers for hire than those imposed on private carriers, there is no constitutional requirement for such a differentiation and the state may validly tax both classes alike.

IV.

Section 20 of the Act is not Violative of Section 8 or Section 10 of Article I or of Amendment XIV of the Constitution of the United States.

Illinois offers to all nonresidents the right to operate their motor vehicles over Illinois highways tax-free, provided the state of the nonresident grants like privileges to Illinois residents. Reciprocity provisions like those in Section 20 of the 1951 Act have been enacted by the great majority of states and promote alike the convenience of the state in administering motor vehicle tax laws and the convenience of operators of motor vehicles in interstate commerce.

Section 20 does not burden interstate commerce or unlawfully discriminate against one from a nonreciprocal state, nor against a resident taxpayer, in favor of those from reciprocal states. This Court has upheld the propriety of such reciprocal legislation. In any event, appellants may not complain of any asserted discrimination against nonresidents from nonreciprocal states as they are not members of that class.

Reciprocal provisions of state statutes, a feature common to many state laws, without as well as within the field of motor vehicle taxation, are not prohibited by Article I, Section 10 of the Federal Constitution, the so-called "compact clause". This clause has reference to political alliances and the formation of any combination tending to increase the political power of the states. This Court has never held the reciprocal provisions of a state statute to be unconstitutional and, indeed, has indicated approval of the reciprocal features of state motor vehicle tax laws.

Appellants cannot complain that Section 20 of the 1951 Act constitutes an unlawful delegation of state legislative power as no such objection was raised by appellants in their Specification of Errors in this Court. In any event, the delegation of power within the framework of state government is a matter with which the Federal Constitution has no concern. In its opinion the Supreme Court of Illinois defined the powers and duties of the Secretary of State under Section 20 of the 1951 Act and limited his duties to ascertaining which states grant reciprocity and confined his powers to embodying those findings in the official form of a reciprocity agreement. This finding of the Illinois Supreme Court conclusively establishes the meaning of the statue and disposes of any contention that broad legislative power is delegated to the Secretary of State.

V.

The Provisions of Section 9 of the 1951 Act Relating to Busses Operating Within Municipalities or a close Radius Thereof do not Constitute an Unlawful Delegation of Legislative Authority and are not subject to Objection on the Ground of Indefiniteness.

Appellants charge that Section 9 (1) (7) is so vague and indefinite, and vests discretion in the administrative authorities which is so broad, as to be arbitrary in violation of the Fourteenth Amendment. The court below expressly found in its construction of the 1951 Act that neither Section 9 (1) (7), nor the word "municipality" nor the phrase "or a close radius thereof" contained therein, were vague and indefinite. The Illinois Supreme Court construed all of the foregoing and gave each a precise meaning which is binding. The construction of a state statute by the state's court of last resort is final and controlling everywhere. This construction eliminates any basis for appellants' contention.

ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under the commerce clause.

Throughout their brief appellants have urged the invalidity of the 1951 Act upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution. We submit that the appellants have no standing in this Court to challenge the 1951 Act on this ground.

The appellants are eleven in number. Each is an individual who is a resident of Illinois. Each is engaged in intrastate trucking operations within Illinois. Eight of the eleven are holders of certificates of convenience and necessity as local carriers under the provisions of the Illinois Truck Act (Ill. Rev. Stat. 1951, Chap. 95½, Secs. 240-282) (R. 2, 21). The remaining three operate as private carriers. The trucking operations of each of appellants is confined entirely to the State of Illinois with the possible exception of two of the eleven.

Manford MacPherson testified that he resides at White Hall, Illinois and is engaged in farming and trucking. His testimony shows that he is engaged in extensive intrastate trucking throughout Illinois (R. 78-81). During the course of his testimony this appellant stated that "we haul considerable amount of apples and fruit, some of which will go out of state" (R. 79) and "my transportation of cattle and hogs is either Chicago or St. Louis" (R. 81).

Buell Ford, another appellant, testified that he resides at Roodhouse, Illinois, and is engaged in farming and

trucking (R. 82). In the course of his testimony as to his trucking operations he stated ". . . they hire you to haul to St. Louis and Chicago" (R. 83).

The foregoing is the sole evidence in the record as to interstate activities by any of the appellants. The nature and extent of the interstate operations by MacPherson and Ford is not shown and for aught that appears such hauling was, at most, sporadic or occasional and so exceedingly small in comparison with their intrastate activities as to be *de minimis*.

As residents of Illinois, MacPherson and Ford make extensive use of Illinois highways in intrastate commerce and are taxed on a parity with all other truck owners and operators. The license fees which they pay to Illinois give them the full privilege of unlimited use of the Illinois highways for the registration period. These license fees are neither increased nor diminished by reason of use of the vehicles in interstate commerce. Any of the appellants whose operations are confined solely to Illinois could commence interstate operation without the payment of additional taxes to Illinois. Likewise any appellant engaging in both intrastate and interstate operations could cease his interstate operations but would nevertheless be required to pay the Illinois taxes because of his intrastate operations. Since each of the appellants is required to pay the Illinois taxes because of his intrastate operations it is apparent that none are within the class of interstate vehicle operators as to whom the unconstitutional burden is claimed to exist. Consequently they are not entitled to rely upon the commerce clause in this Court. In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (p. 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the

> Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade,* 233 U.S. 642, 648; *Massachusetts* v. *Mellon,* 262 U.S. 447, 488; *Hendrick* v. *Maryland,* 235 U.S. 610, 621; *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 595-596.

The Supreme Court of Illinois held that appellants had standing in that Court to challenge the validity of the tax under the commerce clause of the Federal Constitution because an Illinois statute (Ill. Rev. Stat. 1951, Chap. 102, Secs. 11-16) permits suits by taxpayers to restrain disbursement of public moneys in connection with the enforcement of a state law alleged to be unconstitutional. The Supreme Court of Illinois then proceeded to a determination on the merits adverse to appellants' contention. However, that form of qualification of a litigant to raise a question of constitutionality in a state court does not serve to give the party a right to raise the constitutional question in this Court. Despite the fact that a state court may pass upon the merits of a constitutional question, the appellant, to be entitled to a review by this Court, must show that he is directly and personally aggrieved by the statute. This the appellants here cannot do. *Tyler* v. *Judges,* 179 U.S. 405, 410; *Smith* v. *Indiana,* 191 U.S. 138; *McCandless* v. *Pratt,* 211 U.S. 437; *Southern Railway Co.* v. *King,* 217 U.S. 524.

A case directly in point is *Miles* v. *Department of Treasury,* 209 Ind. 172; 199 N.E. 372 (appeal dismissed 298 U.S. 640), where appellants brought an action as taxpayers on behalf of themselves and others similarly situated to

enjoin state officials from paying out state funds for the printing of the Gross Income Tax Act of 1933 on the ground that the statute was violative of both the State and Federal Constitutions. The Supreme Court of Indiana considered the claims of unconstitutionality on the merits and upheld the validity of the Act. In dismissing the appeal this Court said (298 U.S. 640):

> "The appeal herein is dismissed upon the ground that the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution. *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 406, 407, 410; *Southern Ry. Co.* v. *King*, 217 U.S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550."

II.

The 1951 Act does not impose an unlawful burden upon interstate commerce.

Although we have demonstrated in Point I, above, that appellants have no standing in this Court to challenge the 1951 Act under the commerce clause, nevertheless we will show that the claim of an unconstitutional burden on interstate commerce is without merit.

In *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, the most recent case in which this Court considered the application of state motor vehicle taxes to interstate commerce, this Court said (p. 544):

> ". . . Courts have invoked the commerce clause to invalidate state taxes on interstate carriers only upon finding that: (1) the tax discriminated against interstate commerce in favor of intrastate commerce; (2) the tax was imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance

or for administration of road laws; or (3) the amount of the tax exceeded fair compensation to the state."

The 1951 Act is valid under each of these three tests.

1. The 1951 Act does not discriminate against interstate commerce in favor of intrastate commerce.

The taxes imposed by the 1951 Act apply equally to interstate and intrastate commerce. Hence, the statute may not be said to discriminate against interstate commerce.

2. The 1951 Act imposes a tax for road construction and maintenance purposes.

The tax imposed by the 1951 Act is an exaction for the purpose of road construction and maintenance and administration of road laws. In its decision in this case the Supreme Court of Illinois held (412 Ill. 204, 216; R. 277):

> "The act imposes a tax on motor vehicles for the use of public highways by its explicit terms, which tax, pursuant to the Motor Vehicle Act, must be deposited in a special road fund to be used only for retirement of bonded indebtedness for construction of highways, payment of the cost of administration of said act, and for improvement and maintenance of the highways of the State."

It is thus apparent that the tax is not levied upon the privilege of doing an interstate business. *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 544; *Aero Mayflower Transit Co.* v. *Railroad Commissioners,* 332 U. S. 495, 504-505.

3. The taxes imposed by the 1951 Act do not exceed fair compensation to the State for the privilege granted.

The burden of proof in respect to the claim that the taxes imposed by the 1951 Act are unreasonable in amount and exceed fair compensation to the State for the privi-

lege granted rested upon appellants. *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 548; *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 599; *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 251. We submit the record in this case is wholly barren of any evidence to sustain a charge that the amount of the taxes in question is unreasonable or excessive. On the contrary, the record supports the conclusion of the Supreme Court of Illinois that:

> ". . . the taxes imposed by the amended act have a reasonable basis, are not discriminatory, and do not produce a revenue in excess of fair and reasonable compensation for the privilege of using the State roads." (412 Ill. 204, 228; R. 287.)

First. Throughout their brief appellants have assailed the taxes imposed by the 1951 Act as failing "to provide any fair relationship between the amount of the tax and the use of the highways" (Appellants' Brief, page 18; and see similar statements at pages 5, 9, 12, 14, 17, 20 and 25); as being "devoid of a rational basis" and "in excess of fair compensation for the privilege of using the Illinois highway system" (Appellants' Brief, page 23). These assertions are made "at large" with repeated references to the annual tax of $1588 imposed upon vehicles in the 50,000 to 72,000 pounds class after January 1, 1954 (Appellants' Brief, pages 5, 13, 19, 23) as though a tax in such amount were unreasonable and invalid *per se*. Appellants have failed utterly to discharge the burden which rested upon them to establish that the taxes imposed by the 1951 Act, in fact, are in excess of fair compensation to the State for the unlimited privilege of use of the State's highways. On the contrary, appellants have ignored the evidence in the record which demonstrates beyond dispute the rational basis for the taxes imposed and the reasonableness of the amounts thereof.

The evidence on behalf of the State shows without dispute that in passing the 1951 Act, the Illinois General Assembly fixed the tax rates in accordance with the findings and recommendations of a study made by the Illinois Department of Public Works and Buildings. This study and the evidence in support of the same were presented at the trial by Frank N. Barker, Chief Highway Engineer of the Department of Public Works and Buildings (R. 96). Mr. Barker identified and explained Defendants' Exhibit 2 (R. 255, offered at R. 114, 115) as having been prepared under his direction and supervision. This exhibit is a statistical table reflecting in detail calculations made to equalize payments of motor vehicle license fees and motor fuel taxes[1] by operators of trucks, busses and other vehicles of the second division with those made by operators of passenger cars on a ton-mile basis. In his testimony Mr. Barker gave an explanation of the various columns and calculations reflected in Defendants' Exhibit 2 (R. 255, offered at R. 114, 115). His testimony in this regard appears at pages 99 to 109 of the record. A summary of this evidence is set forth in the opinion of the Supreme Court of Illinois. (412 Ill. 204, 214-216; R. 275-277).

The study established that Illinois passenger car operators paid motor vehicle license taxes and motor fuel taxes (the proceeds of which are used exclusively for highway purposes) equivalent to $0.00251 per ton-mile of travel per vehicle (R. 255, Column 17, offered at R. 114, 115; 412 Ill. 204, 216; R. 276). The study further showed that, except with respect to trucks of 3,000 pounds or less gross

[1] The Motor Fuel Tax Law imposes a tax "on the privilege of operating motor vehicles upon the public highways of this State", at specified rates per gallon of fuel consumed in vehicles upon such highways. (Ill. Rev. Stat. 1951, Chap. 120, Sec. 418). Section 8 of that Act (Chap. 120, Sec. 424) requires that all taxes collected under the Act be placed in a special fund in the State Treasury to be known as the "Motor Fuel Tax Fund" and devoted to public highway purposes.

weight, motor truck operators were paying substantially less taxes per ton-mile than were passenger car operators. In making such calculations it was necessary to take into consideration, the average miles travelled per year by the various weight classifications of vehicles. The source of such annual average mileage figures was summarized by the Supreme Court of Illinois as follows:

> "These figures were taken from a comprehensive report made in 1948 covering the Illinois highway problem by an independent engineering concern employed by the State of Illinois for that purpose.
>
> "From evidence introduced at the trial, such average travel-per-year figures were based on the results of a questionnaire survey of motor vehicle owners and operators made in the late thirties in Illinois and other States, as were other figures used, such as fuel consumption, modified as justified by later information." (412 Ill. 204, 215; R. 276).

The study then proceeded to determine what amounts of annual motor vehicle flat taxes should be paid with respect to the various weight classifications of trucks in order to equalize the ton-mile payments of motor vehicle taxes and motor fuel taxes by truck operators with those paid by passenger car operators.

The results of the study, in summary form, are shown in the following table taken from Defendants' Exhibit 2, (R. 255, offered at R. 114, 115):

	Trucks	Average Travel Per Year	License Fee as Equalized	License Fee S. B. 96 Effective Jan. 1, 1954
		(4)	(22)	(23)
A	3000# and less	7,500	$ 1.62	$ 5.00
B	3001# to 8000#	10,000	21.29	21.00
C	8001# to 10000#	12,500	57.66	58.00
D	10001# to 12000#	16,000	87.11	87.00
E	12001# to 14000#	18,500	113.89	114.00
F	14001# to 16000#	20,500	141.24	141.00
G	16001# to 20000#	23,500	215.89	216.00
H	20001# to 24000#	28,000	351.95	352.00
Bus	24000# to 36000#	30,000	545.59	545.00
X	24001# to 41000#	36,500	810.47	588.00 810.00 890.00
K	41001# to 45000#	36,500	979.61	980.00
L	45001# to 50000#	36,500	1,097.96	1,098.00
N	50001# to 59000#	36,500	1,244.81	1,245.00
P	59001# to 72000#	36,500	1,587.98	1,588.00

The left hand column indicates the various weight classifications of vehicles. The second column numbered "4" shows the average annual mileage figures used in making the calculations contained in the study. The third column numbered "22" shows the amount of the annual license fee for each weight classification required to accomplish equalization with passenger cars. The fourth column numbered "23" reflects the schedule of license fees effective January 1, 1954 as adopted in the 1951 Act.

It will be seen from the foregoing that, with immaterial modifications, the Illinois legislature in passing the 1951 Act adopted the schedule of license fees resulting from the equalization study, and a finding to this effect was made by the Supreme Court of Illinois in its opinion (412 Ill. 204, 216; R. 277):

> "Flat license fees per weight bracket as adopted by the 1951 amendment apply and adopt the license fees as thus equalized, rounded out to the nearest dollar."

It should be noted that the taxes imposed by the 1951 Act will not produce revenue in excess of the State's needs for highway purposes. The evidence demonstrates that during the 1951-60 period the State will have a total need for $1,151,041,232.00 for highway purposes (R. 253, offered at R. 114, 115), and that the revenue produced by the 1951 Act, together with taxes collected under the Motor Fuel Tax Act will yield a net amount available for highway purposes of only $676,961,887.00 (R. 254, offered at R. 114, 115), leaving a deficiency of $474,079,345.00 (R. 253, 254, offered at R. 114, 115; 412 Ill. 204, 214; R. 275). This fact was confirmed by the Supreme Court of Illinois which stated in its opinion (412 Ill. 204, 228; R. 287):

> "The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty percent of the revenues needed by the State for the maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used."

We submit that the foregoing clearly demonstrates the rational basis of the tax schedules imposed by the 1951 Act and that the amounts fixed are fair and reasonable in the light of the needs of the State for highway purposes.

Second. Appellants assert that the "optional mileage tax provided an alternative tax which obviated the discriminatory result now existing and its repeal completely obliterated any safeguards against unreasonable taxation under the 1951 Amendment" (Appellants' Brief, page 13). Again they say "this burden upon Interstate Commerce resulting from the 1951 Amendment could have been obviated had the mileage weight provisions of the prior enactment been retained" (Appellants' Brief, pages 17, 18).

It should be borne in mind that the tax imposed by the 1951 Act is for the unlimited privilege of using the Illinois

highways. Having paid the tax a carrier is free to use the Illinois highways as much or as little as it chooses during the registration period. "The fee is for the privilege of a use as extensive as the carrier wills that it shall be". *Aero Transit Company* v. *Georgia Commission*, 295 U. S. 285, 289.

The existence of the optional mileage tax during the 1935 to 1952 period gives appellants no vested right to a continuance of such enactment. The legislature in its discretion had the clear right to repeal such provisions and to frame the motor vehicle tax of Illinois upon a basis other than that of a direct mileage tax. This Court has repeatedly sustained the validity of state motor vehicle laws imposing flat annual taxes from *Hendrick* v. *Maryland*, 235 U. S. 610, in 1915, to *Aero Mayflower Transit Co.* v. *Railroad Commissioners*, 332 U. S. 495, in 1947, the last time this Court passed upon the matter. Likewise this Court has squarely held that such laws to be valid need not be framed upon the basis of a mileage tax. In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, this Court said, (p. 289):

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. *Clark* v. *Poor* (274 U. S. 554), *supra*; *Hicklin* v. *Coney* (290 U. S. 169), *supra*. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

See also: *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542; *Aero Mayflower Transit Co.* v. *Railroad Commis-*

sioners, 332 U. S. 495; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72; *Hicklin* v. *Coney*, 290 U. S. 169.

The principal theme of appellants' argument, recurring throughout their brief, seems to be that the Illinois legislature should have adopted some method of taxation other than an annual lump sum license fee and, more particularly, a tax having a formula directly related to the mileage travelled by an individual carrier. Such an argument could properly have been made before the legislature. But the decisions of this Court show clearly that the broad range of legislative discretion is such that the judgment of the legislature is not open to challenge here, provided the annual tax is a fair charge for the privilege of using the State's highways for the registration period. On this exact point this Court said in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, 547, answering contentions similar to those made by the appellants:

> ". . . But with full appreciation of congenital infirmities of the Maryland formula—and indeed of any formula in this field—as well as of our present rules to test its validity, we are by no means sure that the remedy suggested by appellants would not bring about greater ills. Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision'. *Harvester Co.* v. *Evatt*, 329 U. S. 416, 422-423. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285, 289. Upon this

type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads."

But even though, as we have shown, a state may validly impose a flat annual license tax graduated in accordance with weight upon all classes of truck operators, it should be noted that in fact in Illinois *total* taxes paid by truck operators for road construction and maintenance purposes do vary in direct relation to mileage travelled. The taxes imposed by the Motor Vehicle Law should not be viewed alone but must be considered in conjunction with the tax on motor fuel imposed by the Motor Fuel Tax Law. (Ill. Rev. Stat. 1951, Chap. 120, Sec. 417 *et seq.*). The latter act levies a tax (Sec. 418):

". . . on the privilege of operating motor vehicles upon the public highways of this State, at the rate of three cents per gallon of all motor fuel used in such motor vehicles upon such public highways prior to August 1, 1951, at the rate of four cents per gallon of all motor fuel used in such motor vehicles upon such public highways after July 31, 1951, and prior to January 1, 1953, and at the rate of five cents per gallon of all motor fuel used in such motor vehicles upon such public highways after December 31, 1952."

Section 8 of the Act (Ill. Rev. Stat. 1951, Chap. 120, Sec. 424) requires that all money received under the Act be placed in a special fund in the State Treasury to be known as the "Motor Fuel Tax Fund" and devoted to public highway purposes.

It will thus be seen that the annual license fees imposed by the Motor Vehicle Law constitute minimum amounts payable by all motor truck operators in the state but that, in addition, they are required to pay the motor fuel tax which will vary in direct proportion to the amount of fuel

purchased and consumed. Therefore, considered together the net effect of the two acts is that the total amount of the tax paid by motor truck operators will vary in accordance with the amount of motor fuel consumed which, of course, is directly related to the number of miles travelled by the vehicle. The amount of revenue received by the State from the motor fuel tax is substantially greater than the amount of revenue derived from the license fees under the 1951 Act. Defendants' Exhibit No. 1 (R. 254, offered at R. 114, 115), which was the estimate of receipts for the period 1951 to 1960, inclusive, based on the increased motor fuel tax rates provided by section 2 of the Motor Fuel Tax Law and upon the increased license tax rates provided by the 1951 Act, demonstrates that the total revenue to be raised under both acts will be $1,728,653,856. Of this amount motor vehicle license fees will contribute $650,496,803 and the motor fuel tax receipts will contribute $1,078,157,053 (R. 254, offered at R. 114, 115). It will thus be seen that approximately 63 per cent of the taxes paid by owners and operators of motor vehicles for highway purposes will be realized from the motor fuel tax which is in effect a tax based upon the number of miles traveled. The propriety of considering as a unit all taxes levied by the State for the privilege of using its highways has been recognized by this Court. In *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, the Court said, at page 546:

> "And it should be noted that the total charge of Maryland for the privilege of using its roads will not show the same disparity among carriers. For Maryland also charges a mileage tax, and this tax added to the title tax is what Maryland actually charges for its road privileges. Thus the total charge as among carriers does vary substantially with the mileage travelled."

III.

The 1951 Act is not arbitrary or discriminatory in violation of the Fourteenth Amendment.

In Point I of their brief, appellants urge that the taxes imposed by the 1951 Act, are arbitrary and unreasonable in violation of the Fourteenth Amendment. Their argument appears to be based upon two propositions for which appellants cite no authority and which we will demonstrate to be wholly without merit.

First, at page 12 of their brief, appellants say:

> "... this failure to recognize the basic differences in the average mileages of different classes of users necessarily renders the 1951 Amendment unconstitutional and void."

In Point II above, we have shown that the 1951 Act adopted the tax schedules arrived at as a result of a survey and study conducted by the Illinois Department of Public Works and Buildings for the purpose of equalizing motor vehicle taxes and motor fuel taxes paid by truck operators with similar taxes paid by passenger car owners (pages 17-19, *supra*). We have also shown that in arriving at such equalization the average miles traveled per annum by the various weight classifications for trucks were taken into consideration and that hence the taxes imposed by the 1951 Act are in part based upon a mileage factor (pages 17-19, *supra*). But irrespective of this fact, we have also pointed out that this Court, when considering the validity of state motor vehicle tax laws assailed as constituting an unreasonable burden upon interstate commerce, has consistently held that such laws to be valid need not be framed on the basis of mileage taxes (pages 20-22, *supra*).

Likewise this Court has considered and rejected the argument that a state motor vehicle tax law is invalid under the Fourteenth Amendment because not framed on the basis of a mileage tax. In *Carley & Hamilton* v. *Snook*, 281 U. S. 66, two carriers whose operations were confined largely to municipalities contended they should not be required to pay state motor vehicle license fees because they did not use the state highways and did not operate to any substantial extent outside the confines of municipalities. The carriers asserted that the application of the state license fees to them amounted to a violation of the Fourteenth Amendment. This Court in overruling such contentions said (p. 71, 72):

> "Whatever other descriptive term may be applied to the present registration fees, they are exactions, made in the exercise of the state taxing power, for the privilege of operating specified classes of motor vehicles over public highways, and expended for state purposes. Such fees, if covered into the state treasury and used for public purposes, as are general taxes, obviously would not offend against the due process clause. Nor can we see that they do so the more because the state has designated the particular public purposes for which they may be used. There is nothing in the Federal Constitution which requires a state to apply such fees for the benefit of those who pay them. See *Thomas* v. *Gay*, 169 U. S. 264, 280.
>
> "A corollary of this contention is that although the fees are not *per se* disproportionate to the privilege of operating over all the highways of the state, appellants are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few highways which they wish to use, upon payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none, which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook."

Second, at page 12 of their brief, appellants say:

> "Since the private carrier has an absolute right to the use of the highways and a carrier for hire has a qualified and restricted use, such differences must be recognized if the validity of this tax is to be sustained."

Appellants' assertion that a private carrier has an absolute right to the use of state highways is without foundation. Appellants cite no authorities in support of their contention and we know of no such holdings. On the contrary, this Court and other courts have consistently held that no one has "an absolute right to the use of the highways". It has always been recognized that where a state expends large sums to build improved highways, it may absolutely deny the use of them to any and all except those who pay the license taxes exacted by the state for the use of such roads. In cases involving private carriers, this Court so held in *Hendrick* v. *Maryland*, 235 U. S. 610, and in *Kane* v. *New Jersey*, 242 U. S. 160. In the *Hendrick* case, this Court said (p. 623, 624):

> "In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

This Court has never departed from that rule.

Appellants' second fallacy, stemming from the first, is that a state is required to fix license taxes for private carriers at a lower level than the taxes for carriers for hire. Nothing exists either in legal precedent or logic to support such a claim. The point was expressly decided contrary to appellants' contention in *Eavey Co.* v. *Department of Treasury of Indiana*, 216 Ind. 255, 24 N. E. 2d, 268 (1939). There suit was brought by certain shipper-owners of trucks attacking the validity of the Indiana Motor Vehicle Weight

Tax. Among other things it was contended that under the 1933 Act certain taxes were imposed upon carriers for hire which did not apply to the operation of trucks by shipper-owners. A subsequent Act of the legislature removed the exemption as to trucks of shipper-owners so that they were taxed on the same basis according to weight as were trucks of carriers for hire. The court held that the taxation of trucks of shipper-owners and those of carriers for hire upon the same basis was entirely reasonable and not subject to constitutional objections, saying (24 N. E. 2d 271):

> "It is well known that under the law existing before the enactment of Chapter 255 certain shipper-owners were not taxed. The Legislature evidently concluded that the untaxed shipper-owner possessed an advantage over contract carriers and those who kept trucks for hire, and concluded that one caused as much wear and tear on the highways as the others, and that the shipper-owner in all fairness should be subject to a tax in order to pay his proportionate part of the construction and upkeep of the highways. Instead of subdividing the class and exempting certain owners of trucks as was done, by the 1933 act, both trucks used by owners in transporting their own products and trucks used for hire are placed in the same class, and made subject to the same weight tax by Chapter 255.
>
> "This question was one of policy for the Legislature and is one with which the courts are not concerned. The legislative history of the control, regulation, and taxation of motor vehicles upon the public highways of the state discloses that throughout the Legislature has classified vehicles; that the classifications have been upheld uniformly by this court; and the right and authority of the Legislature to place a tax upon one subdivision and not upon another has been sustained as a state policy. The authorities cited by appellants sustain the right to classify. The requirement is that all coming within the same classification must be treated alike. When a classification is reasonable it is not violative of the provisions of the Constitutions, state or federal."

An appeal from the decision of the Supreme Court of Indiana was dismissed by this Court in 310 U. S. 611, where it was said:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Hendrick* v. *Maryland*, 235 U. S. 610; *Hicklin* v. *Coney*, 290 U. S. 169, 173; *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 72-73; *Arthur* v. *Indiana*, 309 U. S. 630."

In addition this Court and state courts of last resort have uniformly sustained annual flat license fees applicable alike to private carriers and carriers for hire. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Saviers* v. *Smith*, 101 Ohio St. 132, 128 N. E. 269; *Solberg* v. *Davenport*, 211 Iowa 612, 232 N. W. 477; *ExParte Kessler*, 26 Idaho 764, 146 Pac. 113.

IV.

Section 20 of the Act is not Violative of Section 8 or Section 10 of Article I or of Amendment XIV of the Constitution of the United States.

In point II of their brief appellants assail Section 20 of the 1951 Act (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 22) as being violative of the commerce clause and the Fourteenth Amendment and also as being violative of Section 10 of Article I of the Federal Constitution.

Section 20 of the Act contains so-called reciprocity provisions under which Illinois offers to all nonresidents the right to operate their motor vehicles over Illinois highways without the payment of motor vehicle license taxes to the extent that the state of the nonresident grants like exemptions and privileges to residents of Illinois. This provision in substantially its present form has been in the Motor Vehicle Law of Illinois since 1919.

At pages 14 and 15 of their brief appellants set forth six numbered specifications wherein they assert Section 20 is violative of the Fourteenth Amendment and the commerce clause of the Federal Constitution. In substance these contentions of the appellants are as follows:

1. That Section 20 is discriminatory in that residents of Illinois are required to pay motor vehicle license taxes whereas nonresidents from reciprocal states are permitted to use the Illinois highways without the payment of such taxes.

2. That by the charging of a motor vehicle license tax to a motor vehicle operator from a nonreciprocal state Illinois imposes an unlawful burden on interstate commerce and discriminates against such nonresident from a nonreciprocal state in favor of a nonresident from a reciprocal state.

Appellants cite no authorities whatsoever in support of the contentions made in point II of their brief and, indeed, they could not, for the decisions of the courts are uniformly directly contrary to the arguments advanced.

The first contention concerning discrimination against Illinois residents in favor of nonresidents from reciprocal states, is completely answered by *Storaasli* v. *Minnesota*, 283 U. S. 57. The plaintiff resided on the United States Military Reservation at Ft. Snelling, within Minnesota. For all purposes of the case he was treated by the State of Minnesota and by this Court as a resident of Minnesota. He complained that Minnesota discriminated against him by requiring him to pay a tax for the use of the highways by his automobile while it permitted nonresidents from reciprocal states to drive their cars in Minnesota without charge. Holding the statute valid this Court said with respect to reciprocity provisions (p. 63):

"But, as was pointed out in *Kane* v. *New Jersey*, 242 U. S. 160, the absence of any such provision in favor of nonresidents, would not render the law discriminatory. A resident of the State who desires to operate his car for a single day is liable for the entire year's tax. If the State determines to extend a privilege to nonresidents, it may with propriety limit the concession to those who have duly registered their vehicles in another State or country. The mere fact that appellant has not so registered his car and cannot, therefore, bring himself within the class benefited by the exemption, does not create a discrimination against him."

In addition, attention is called to the following decisions of state courts of last resort to the same effect: *State* v. *Caplan*, 100 Vt. 140, 135 Atl. 705, 710; *Lillard* v. *Melton*, 103 So. Car. 10, 87 S. E. 421, 424; *State* v. *Lawrence*, 108 Miss. 291, 66 So. 745, 747; *City of Newport* v. *Merkel Bros. Co.*, 156 Ky. 580, 161 SW 549; *Ex Parte Schuler*, 167 Cal. 282, 139 Pac. 685; *City of Ft. Smith* v. *Scruggs*, 70 Ark. 549, 69 SW 679.

The second contention with respect to discrimination against nonresidents from nonreciprocal states in favor of nonresidents from reciprocal states and with respect to the alleged burden upon interstate commerce is likewise completely refuted by the decision of this Court in *Kane* v. *New Jersey*, 242 U. S. 160. Kane, a resident of New York, claimed that an act of New Jersey violated the commerce clause of the Federal Constitution because New Jersey required him to obtain a New Jersey license for a full year for one trip into the state. Kane claimed that the New Jersey law violated the commerce clause because it did not contain a reciprocal provision. In deciding against Kane the Court said (p. 168) with respect to reciprocal provisions:

"Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay

> the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against non-residents; for any resident similarly situated would be subjected to the same imposition."

We again wish to call to the attention of the Court that all of the appellants in this case are residents of Illinois and that none is a nonresident from a nonreciprocal state. Hence none of the appellants here has standing to plead the grievance, if any, of a nonresident of Illinois from a nonreciprocal state. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596; *Hendrick* v. *Maryland*, 235 U. S. 610, 621.

At pages 15 and 17 of their brief appellants, again without the citation of authorities, assert that Section 20 is violative of Section 10 of Article I of the United States Constitution. This constitutional provision provides in part:

> "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . .".

It should be noted that Section 20 of the Act is divided into two paragraphs. The first paragraph provides for reciprocity as to nonresidents of Illinois to the extent that the states of the nonresidents grant like exemptions and privileges to residents of Illinois. The second paragraph of Section 20 grants authority to the Secretary of State to "effectuate the purposes" of the first paragraph by entering into reciprocal agreements with representatives of other states.

That appellants' contention is without merit is demonstrated by *Dixie Wholesale Grocery* v. *Martin*, 278 Ky. 705,

129 S. W. 2d 181. There Kentucky and Ohio had an agreement for the interchange of information as to the sales and use of cigarettes in their respective states, for the purpose of determining whether cigarettes sold in one state had been taxed in the other. If it appeared that the taxes had been paid in one state, it was considered that the sale had been made there and that the tax in the other state would not apply. This agreement was attacked as violative of the constitutional provision referred to above.

The Kentucky court said (129 S. W. 2d 184):

> "The reciprocal agreement between Ohio and Kentucky for the exchange of data contained in the sales tax reports required of certain businesses conducted within their respective borders does not conflict with Article I, Section 10, of the Federal Constitution, U. S. C. A., prohibiting one state from entering into a compact with another. This section has reference to political compacts, alliances and treaties."

The Kentucky court then quoted from *Virginia* v. *Tennessee*, 148 U. S. 503, as follows:

> "There are many matters upon which different states may agree that can in no respect concern the United States."

The Supreme Court of Kentucky then concluded as follows (129 S. W. 2d 184):

> "A mere reading of this section shows conclusively it has no application to such reciprocal agreement as has been entered into between Kentucky and Ohio in an effort to keep their respective tax laws from being evaded."

This Court denied certiorari, 308 U. S. 609.

In *Virginia* v. *Tennessee*, 148 U. S. 503, this Court said at page 519:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibi-

tion is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."

Again in *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545, this Court at page 562 of its opinion stated that reciprocal legislation:

"... on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States."

This Court will take judicial notice of the fact that the great majority of the States in the United States have enacted reciprocal legislation similar to the Illinois act containing authorizations to their administrative officers to enter into reciprocal agreements with the representatives of other States. So far as we have been able to ascertain no court has ever held such reciprocal legislation or the reciprocal agreements entered into pursuant thereto to be violative of the Federal Constitution. On the contrary, this Court has considered motor vehicle acts containing reciprocal legislation similar to that of Illinois, and although the unconstitutionality of the reciprocal provisions was not specifically raised by the parties, this Court, with the law before it containing such provision, upheld the validity of the entire act. See, *Hendrick* v. *Maryland*, 235 U. S. 610, 620-621. Also, this Court has commented favorably with respect to such reciprocal legislation in *Kane* v. *New Jersey*, 242 U. S. 160, 168:

"Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court."

In addition to the contentions raised in point II of their brief concerning the unconstitutionality of Section 20 appellants in point III of their brief, at page 17, make the assertion, again without citation of supporting authorities, that the 1951 Act constitutes "an unlawful delegation of legislative power which is prohibitive, in that it authorizes the Secretary of State to enter into agreements with other States, permitting the operation of vehicles without registration or the paying of permit fees or flat taxes." Appellants point to no provision of the Federal Constitution which they claim is violated because of the alleged unlawful delegation of legislative power. Indeed, they could not for such assertion raises no question cognizable under the Federal Constitution.

In *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, this Court said (p. 612):

> "The argument for the appellants is that in this there was a grant of discretionary power overpassing the limits of lawful delegation.
>
> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."

In the case at bar the Supreme Court of Illinois in its opinion stated, (412 Ill. 204, 232; R. 290, 291):

> "Our conclusion that the reciprocity provision of the act merely empowers the Secretary of State to ascertain which States grant reciprocity to Illinois residents and to embody his findings in the official form of a 'reciprocity agreement' not only disposes of plaintiffs' contention that the act delegates legislative authority but also disposes of plaintiffs' contention that such reciprocity agreements violate that provision of

> section 10 of article I of the constitution of the United States which provides that 'No State shall, without the Consent of the Congress, * * * enter into any Agreement or Compact with another State.'"

The decision of the Supreme Court of Illinois with respect to the delegation of legislative power of the State is "'decisive and controlling everywhere'", *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613.

In any event, the appellants' contention with respect to an unlawful delegation of legislative authority is not contained in the Specification of Errors in their brief and therefore may not properly be argued before this Court.

In point numbered 6 on page 15 of appellants' brief it is asserted that Section 20 of the Act enables the Secretary of State of Illinois "to arbitrarily impose a burden on Interstate Commerce as to classes of vehicles and types of commerce." The exact meaning of appellants' contention is not clear but presumably they mean to say that the provisions of Section 20 are so vague, indefinite and uncertain as to repose arbitrary discretion in the hands of the Secretary of State and as to be violative of the Fourteenth Amendment. That such is not the case is made clear by the opinion of the Supreme Court of Illinois, wherein the court says with respect to the meaning of the second paragraph of Section 20, (412 Ill. 204, 232; R. 290):

> "Such statute limits the authority of the Secretary of State to ascertainment of the existence and scope of reciprocal legislation, and whether, in fact, reciprocity can be granted under the provisions of section 20."

Again this finding by the Illinois Supreme Court leaves no federal question open here. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613; *Hicklin* v. *Coney*, 290 U. S. 169, 172.

V.

The Provisions of Section 9 of the 1951 Act Relating to Busses Operating within Municipalities or a Close Radius Thereof do not Constitute an Unlawful Delegation of Legislative Authority and are not Subject to Objection on the Ground of Indefiniteness.

In point III, at pages 15 and 16 of their brief, appellants assert the contention that the provisions of Section 9(1) (7) constitute an unlawful delegation of authority to the Secretary of State and that the word "municipality" and the phrase "or a close radius thereof" are so indefinite and uncertain as to be violative of some provision of the Federal Constitution not specified by appellants. Again, no authority whatsoever is cited by the appellants. Appellants' contentions are completely refuted by the following:

1. The Specification of Errors contained in their brief does not assign as error any question concerning the unlawful delegation of state legislative authority.

2. The Illinois Supreme Court (412 Ill. 204, 228, 230; R. 287-289) found specifically that the word "municipalities" and the phrase "or a close radius thereof" are definite and certain and that the assailed provisions of Section 9 do not amount to an unconstitutional delegation of legislative authority. With reference to the meaning of the term "municipalities" the Supreme Court of Illinois said (412 Ill. 204, 229; R. 288):

> "It is therefore apparent that the legislature by the use of the word 'municipalities' in the statute in question intended to and did refer only to cities, villages and incorporated towns."

With reference to the phrase "or a close radius thereof" the Supreme Court of Illinois stated (412 Ill. 204, 230; R. 289):

> "Thus the phrase 'or a close radius thereof' expresses a well-recognized, ascertainable, unambiguous concept."

Further the court said (412 Ill. 204, 230; R. 289):

> "Subsection (l) (7) of section 9 of the amended act is not vague, indefinite and thereby unconstitutional, nor does it contain an unconstitutional delegation of legislative authority."

This finding of the Supreme Court of Illinois is final and controlling and presents no federal question for review by this Court. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 613; *Hicklin* v. *Coney*, 290 U. S. 169, 172.

3. In any event it is well established that vehicles operating only within a city and a nearby area may properly be separately classified and subjected to lower license taxes than vehicles carrying on a wider scope of operations. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 369, 370. Likewise passenger busses may properly be separately classified and taxed at lower rates than those applicable to freight carrying vehicles. *Sproles* v. *Binford*, 286 U. S. 374, 395, 396.

It should be noted that none of the appellants in this case are engaged in operating passenger-carrying busses and hence none have standing to claim that provisions of the statute relating to a class to which they do not belong are too vague and indefinite. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595; *Hendrick* v. *Maryland*, 235 U. S. 610.

Conclusion.

For the reasons contained in the argument above, it is respectfully submitted that the final judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.

APPENDIX I.

An Act *to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the "Motor Vehicle Law," approved June 30, 1919, as amended.*

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Sections 9, 11a and 20 of the "Motor Vehicle Law", approved June 30, 1919, as amended, are amended to read as follows:

§ 9. All owners of vehicles of the second division as described in Section 2 of this Act, which are designed or equipped or used for carrying freight, goods, wares or merchandise, and all owners of vehicles of said first division which have been remodeled and are being used for such purposes, and all owners of self-propelled vehicles operated as tractors to the weights of which are added the gross weights of the heaviest semi-trailers with their loads used with such tractors, and all owners of vehicles of said second division which are used for carrying more than seven persons, shall pay to the Secretary of State for each calendar year from and after January 1, 1936, for the use of the public highways of this State, a license fee of five dollars ($5.00) for each such vehicle.

Every application for registration of a truck subject to regulation under the provisions of "An Act in relation to the regulation of the operations of trucks designed or used for the transportation of property", approved July 25, 1939, as amended, shall, be accompanied by proof that a valid and unrevoked certificate of safety has been issued for each such truck. No certificate of registration or license plates shall be issued by the Secretary of State to the owner of any such truck unless such proof accompanies such application.

Every owner of a motor vehicle subject to the provisions of this section shall pay to the Secretary of State for each calendar year from and after January 1, 1952, for the use of the public highways a tax at the following rates, to-wit:

(a) Vehicles having a gross weight of three thousand (3000) pounds and less, including the weight of the vehicle and maximum load, $5.00.

(b) Vehicles having a gross weight of more than three thousand (3000) pounds and not more than eight thousand (8000) pounds, including the weight of the vehicle and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(c) Vehicles having a gross weight of more than eight thousand (8000) pounds and not more than ten thousand (10,000) pounds, including the weight of the vehicle and maximum load, $41.00 until January 1, 1954, and thereafter $58.00.

(d) Vehicles having a gross weight of more than ten thousand (10,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, $62.00 until January 1, 1954, and thereafter $87.00.

(e) Vehicles having a gross weight of more than twelve thousand (12,000) pounds and not more than fourteen thousand (14,000) pounds, including the weight of the vehicle and maximum load, $81.00 until January 1, 1954, and thereafter $114.00.

(f) Vehicles having a gross weight of more than fourteen thousand (14,000) pounds and not more than sixteen thousand (16,000) pounds, including the weight of the vehicle and maximum load, $101.00 until January 1, 1954, and thereafter $141.00.

(g) Vehicles having a gross weight of more than sixteen thousand (16,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the vehicle and maximum load, $154.00 until January 1, 1954, and thereafter $216.00.

(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.

(h-1) Four wheel vehicles designed and used for the carrying of more than seven passengers and equipped with balloon tires and hydraulic shock absorbers and having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $389.00 until January 1, 1954, and thereafter $545.00.

(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00.

Six or more wheeled vehicles having a gross weight of more than thirty thousand (30,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $579.00 until January 1, 1954, and thereafter $810.00.

Six or more wheeled vehicles having a gross weight of over thirty-six thousand (36,000) pounds, but not exceeding forty-one thousand (41,000) pounds, including the weight of the vehicle and maximum load, $635.00 until January 1, 1954, and thereafter $890.00.

(i-1) Six or more wheeled vehicles having a gross weight of more than forty-one thousand (41,000) pounds, but not exceeding forty-five thousand (45,000) pounds, including the weight of the vehicle and maximum load, $700.00 until January 1, 1954, and thereafter $980.00.

(i-2) Eight or more wheeled vehicles having a gross weight of more than forty-five thousand (45,000) pounds, but not exceeding fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $784.00 until January 1, 1954, and thereafter $1098.00.

(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.

(i-4) Ten or more wheeled vehicles having a gross weight of more than fifty thousand (50,000) pounds,

but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00.

(j) A self-propelled vehicle operated as a tractor and one semi-trailer shall be considered as one vehicle in computing the above license fees. A semi-trailer used with any device for converting it to a trailer or attached to a leading trailer or semi-trailer shall be licensed as a trailer.

(k) Each additional semi-trailer to be used with a tractor licensed as above, $5.00.

(l) Tractors, traction engines or other similar vehicles used for hauling purposes, except as hereinafter provided, shall pay the same fees according to their weight as hereinbefore required in this section of other vehicles. All owners of trailers used with a motor vehicle shall pay to the Secretary of State for each calendar year from and after January 1, 1952, flat weight taxes for the use of the public highways of this State at the following rates to-wit:

(1) Trailers having a gross weight of 2,000 pounds and less, including the weight of the trailer and maximum load, $1.00.

(2) Trailers having a gross weight of more than 2,000 pounds, and not more than 5,000 pounds, including the weight of the trailer and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(3) Trailers having a gross weight of more than 5,000 pounds, and not more than 10,000 pounds, including the weight of the trailer and maximum load, $44.00 until January 1, 1954, and thereafter $61.00.

(4) Trailers having a gross weight of more than ten thousand (10,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the trailer and maximum load, $79.00 until January 1, 1954, and thereafter $111.00.

(5) Trailers having a gross weight of more than fifteen thousand (15,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the trailer and maximum load, $125.00 until January 1, 1954, and thereafter $175.00.

(6) Trailers having a gross weight of more than twenty thousand (20,000) pounds, and not more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

(7) Trailers having a gross weight of more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

Two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:

(1) Such vehicles having a gross weight of more than 12,000 pounds but not exceeding 14,000 pounds including the weight of the vehicle and the maximum load, $45;

(2) Such vehicles having a gross weight of more than 14,000 pounds but not exceeding 16,000 pounds including the weight of the vehicle and the maximum load, $70;

(3) Such vehicles having a gross weight of more than 16,000 pounds but not exceeding 20,000 pounds including the weight of the vehicle and the maximum load, $105;

(4) Such vehicles having a gross weight of more than 20,000 pounds but not exceeding 24,000 pounds including the weight of the vehicle and the maximum load, $145;

(5) Such vehicles having a gross weight of more than 24,000 pounds but not exceeding 36,000 pounds including the weight of the vehicle and the maximum load, $195.

The registration fee paid by the State of Illinois, or by any county, township, municipal corporation, city, village or incorporated town for each motor vehicle of the second division owned and operated by

it, or by any school district for each motor vehicle of the second division owned and operated by it as a school bus, shall be two dollars for each calendar year.

Upon the filing in the office of the Secretary of State of said application and payment of the registration fee as hereinbefore provided, the Secretary of State, or his duly authorized agent, shall, without further fee, assign to such trailer or semi-trailer as described in said application, a distinctive number plate which shall be attached to the rear of the trailer or semi-trailer. Such license plate shall be so attached as not to swing loosely and shall be not less than twenty inches above the surface of the ground. It shall at all times be kept clean from grease and dirt. None of the owners of the vehicles of said second division shall be required to pay the registration fees in section 8 of this Act. Provided, that none of the provisions of this Act requiring or prescribing registration shall be construed to include farm tractors, traction engines, threshing machines, clover huller, ensilage cutters, corn shredders, corn sheller, corn grinders, hay presses, portable saw mills, binders, combines, farm machinery and implements, farm wagons, or like vehicles, trailers or semi-trailers used in connection therewith, which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, or vehicles used exclusively for moving water well drilling outfits, but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers, or semi-trailers engaged in transporting agricultural products. The owner of any motor vehicle of the second division having a corn sheller, a well driller, hay press, clover huller or farm machinery permanently mounted thereon and used solely for transporting the same, shall pay the license fee of five dollars ($5.00), provided in the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act; Provided, that no such owner shall be entitled to any reduction in such five dollar ($5.00) license fee for the reason that such fee may first become payable during the second half of the calendar year.

§ 11a. Any person, firm or corporation who shall violate any of the provisions of Sections 3a, 9 or 10 shall be subject to a penalty of not less than $10.00, nor more than $100.00 for each offense, together with costs of suit, and shall also be held liable for the payment of all damages caused to any public highway by such violation. Any vehicle used in violation of any section of this Act and thereby causing damage to any public highway shall be subject to a lien for the full amount of all unpaid registration fees, flat weight fees, penalties and damages; provided, however, that such lien shall not release the offender from the full payment of all registration fees, flat weight fees, penalties and damages which may be due from him or be recovered against him in any court of competent jurisdiction and, provided, also that such lien shall not be superior to any chattel mortgage or other lien attaching to such vehicle.

§ 20. Except as herein provided for foreign corporations, the provisions of sections 8, 9, 10, 14, 17, and 27 of this Act, shall not apply to any other motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by the residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of

such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned.

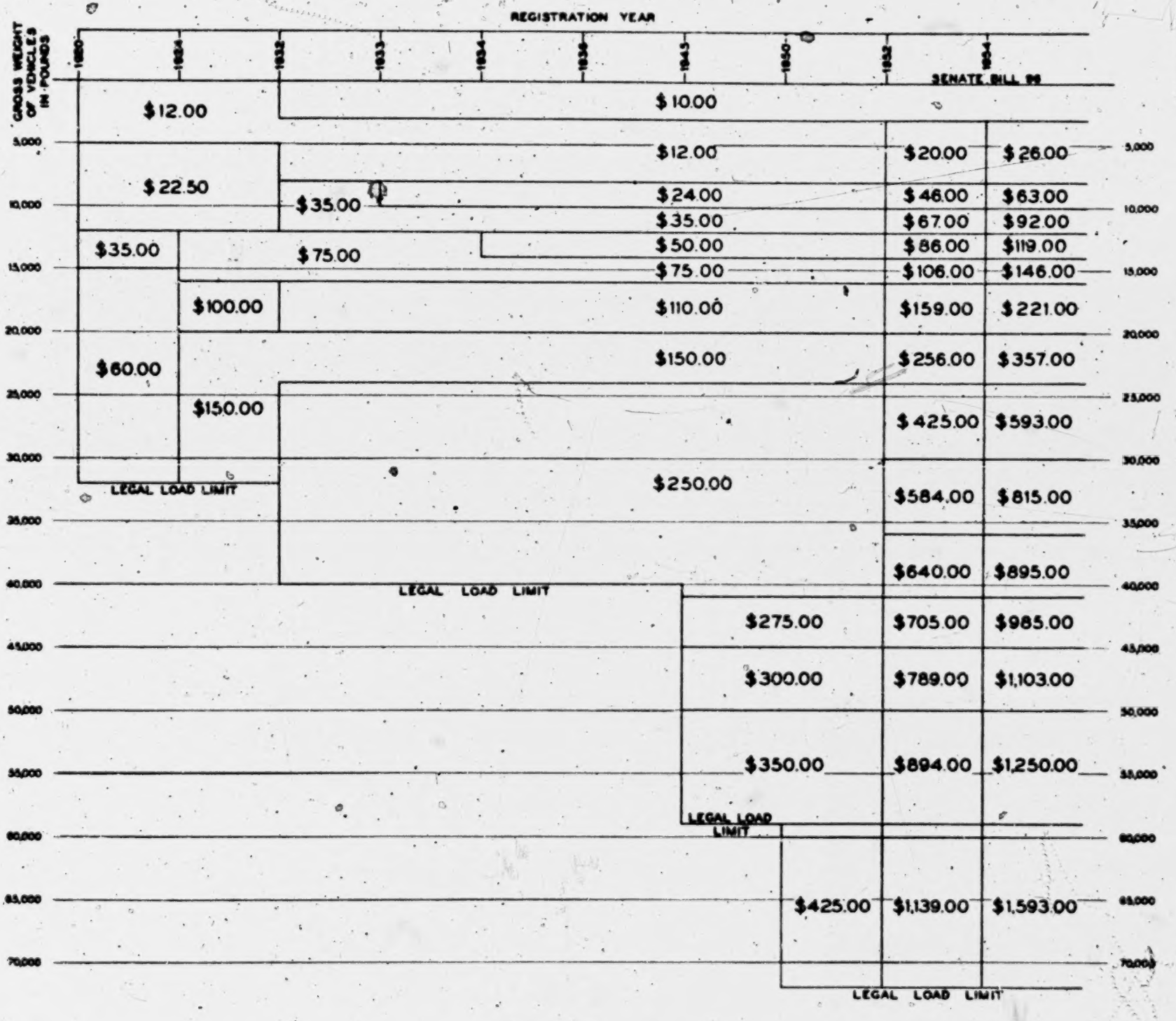
In order to effectuate the purposes of this section, the Secretary of State of Illinois shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees and flat taxes under which motor vehicles, trucks, tractors, trailers or semi-trailers properly licensed or registered in other states may be operated in this State without an Illinois registration or the payment of permit fees or flat taxes; provided like privileges are accorded to vehicles owned by Illinois citizens when operated in such other states.

§ 2. Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 91 of said Act as repealed.

§3. This amendatory act shall be effective January 1, 1952.

APPENDIX II

COMPARISON OF REGISTRATION FEES FOR TRUCKS AND BUSSES OF VARIOUS GROSS WEIGHTS



LIBRARY
SUPREME COURT, U.S.

FILED
DEC 29 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLEES.

IVAN A. ELLIOTT,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.

Printed by Authority of the State of Illinois

INDEX TO SUBJECT MATTER.

	PAGE
Opinion and Report Below	1
Jurisdiction	1
Statement of the Case	2
Summary of Argument	6
ARGUMENT:	
I. Appellants have no standing to challenge the 1951 Act under Section 8 of Article I of the Federal Constitution	11
II. The 1951 Act does not impose an undue burden on interstate commerce in violation of Article I, Section 8, and Amendment XIV, Section 1 of the Constitution of the United States as asserted in point IA of Appellants' Brief	14
III. The 1951 Act does not impose taxes excessive in amount and unconstitutional as asserted in point IB of Appellants' brief	29
IV. The taxes imposed by the 1951 Act are not confiscatory or violative of the Fourteenth Amendment of the Constitution of the United States	37
V. The 1951 Act does not contain arbitrary, inconsistent, vague and uncertain classifications in violation of the Fourteenth Amendment	44
Conclusion	52
Appendix I	i

Table of Cases.

Aero Mayflower Transit Company v. Georgia Public Service Commission, 295 U. S. 285 ..... 29, 34
Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 ..... 26, 27, 28, 34
Bode, et al. v. Barrett, et al., 412 Ill. 204; No. 187 ..... 5, 16, 17, 19, 25, 30, 43, 44, 50, 51
Brashear Freight Lines v. Public Service Commission of Missouri, 23 F. Supp. 865 27
Capitol Greyhound Lines v. Brice, 339 U. S. 542 ..... 15, 24, 34, 35
Clark v. Paul Gray, Inc., 306 U. S. 583 ..... 13, 25, 28, 35, 45
Clark v. Poor, 274 U. S. 554 26
Continental Baking Co. v. Woodring, 286 U. S. 352 ... 26, 52
Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72 26
Hendrick v. Maryland, 235 U. S. 610 ..... 13, 32
Hicklin v. Coney, 290 U. S. 169 ..... 25, 26, 27, 33, 35, 45, 50, 51, 52
Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 .. 50, 51
I. C. R. R. Co. v. Franklin County, 387 Ill. 301 47
Ingels v. Morf, 300 U. S. 290 28
Interstate Busses Corp. v. Blodgett, 276 U. S. 245 35
Interstate Transit, Inc. v. Lindsey, 283 U. S. 183 26
McCandless v. Pratt, 211 U. S. 437 13
McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176 ..... 26, 27
McCray v. United States, 195 U. S. 27 40
Magnano v. Hamilton, 292 U. S. 40 41
Massachusetts v. Mellon, 262 U. S. 447 13
Miles v. Department of Treasury, 209 Ind. 172; 199 N. E. 372; appeal dismissed 298 U. S. 640 ..... 13, 14
Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642 ... 13
Ohio Tax Cases, 232 U. S. 576 44
Prouty v. Coyne, 55 F. 2d 289 ..... 26, 27

Smith v. Indiana, 191 U. S. 138 13
Southern Railway Co. v. King, 217 U. S. 524 13
Sproles v. Binford, 286 U. S. 374 ..... 24, 29, 48
Sprout v. South Bend, 277 U. S. 163 26
Tyler v. Judges, 179 U. S. 405 13
United States v. Sanchez, 340 U. S. 42 43

STATUTES.

Laws, 59th G. A., 1935, page 1233 3
Ill. Rev. Stat. 1951, Chap. 95½:
Secs. 1 *et seq.* 2
Sec. 8 2
Sec. 50 4
Sec. 221 33
Sec. 228(a) 9, 47
Ill. Rev. Stat. 1951, Chap. 111⅔:
Article IV 49
Sec. 56 49
Ill. Rev. Stat. 1951, Chap. 120:
Sec. 418 16
Sec. 424 16
United States Code, Title 28, Section 1257 (2) 1

OTHER.

Illinois Commerce Commission, Gen. Ord. No. 153 49
Report of Joint Committee on the Economic Report entitled "Highways and the Nation's Economy", 81st Congress, 2nd Session 30
"Highway Needs of the National Defense", House Document No. 249, 81st Congress, 1st Session 30

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLEES.

OPINION AND REPORT BELOW.

The opinion of the Supreme Court of Illinois (R. 316-324) is reported in 412 Ill. 321; 106 N. E. 2d 510.

JURISDICTION.

Jurisdiction to review this case is based upon subsection 2 of Section 1257 of Title 28 of the United States Code; Act of Congress June 25, 1948, c. 646(2), 62 Stat. 929.

STATEMENT OF THE CASE.

This case concerns the validity, under the Federal Constitution, of an act of the Sixty-seventh General Assembly of Illinois approved by the Governor of Illinois on July 9, 1951 entitled "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the 'Motor Vehicle Law' approved June 30, 1919 as amended". For the convenience of the Court we will hereinafter refer to the 1951 amendatory act as the "1951 Act".

As indicated by its title the 1951 Act was amendatory of the Illinois Motor Vehicle Law of 1919. We believe a brief outline of the history and nature of the basic Motor Vehicle Law will be helpful in approaching a consideration of the issues in this case. The Motor Vehicle Law was first adopted in 1919 and, subject to various amendments subsequently adopted, remains in effect at the present time. (Ill. Rev. Stat. 1951, Chap. 95½, Secs. 1 *et seq.*)

By Section 2 of the law, motor vehicles are classified into two divisions. Those of the first division are defined as vehicles designed for carrying not more than seven passengers—i.e., passenger cars in the popular sense. The second division is comprised of vehicles designed for pulling or carrying freight, vehicles designed for carrying more than seven passengers and all vehicles not falling within the first division—in short, trucks, busses, tractors, trailers and the like.

From 1919 to date the Motor Vehicle Law has imposed a flat annual registration fee with respect to passenger cars graduated in accordance with the horsepower of the vehicle. (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 8.) The 1951 Act makes no increase or change in passenger car license fee rates and the same are not involved in this case.

Continuously since adoption of the Motor Vehicle Law in 1919 flat annual taxes have been imposed with respect to trucks, busses and other vehicles of the second division. Such taxes have at all times been based upon the gross weight of the vehicle and maximum load and have been graduated in accordance with weight brackets or classifications. By amendments adopted from time to time new weight brackets have been added, existing weight brackets revised, and separate classifications and brackets established for special types of vehicles such as trailers and certain types of busses.

In 1921 Section 9a was added to the Act. This section imposed, in addition to the annual flat taxes, a tax on certain carriers for hire at the rate of one-half cent per mile for freight carriers and one-twentieth of a cent per mile per passenger seat for passenger carriers. In 1923 Section 9a was amended and thereafter until 1935 an annual tax, in addition to the annual flat taxes, was imposed upon certain types of carriers of passengers and freight for hire at the rate of $1.00 and later $1.50 per 100 pounds gross weight of vehicle and load. These additional taxes were imposed with respect to a limited class of carriers operating over fixed routes at fixed schedules of rates and the same were discontinued in 1935.

In 1935 the Motor Vehicle Law was amended to include for the first time a so-called optional mileage weight tax (Laws 59th G.A., 1935, p. 1233). This was a tax measured by the number of miles actually travelled in Illinois by the vehicle and graduated as to rates in accordance with the gross weight of the vehicle and load. Monthly reports and payments of tax were required. Vehicle operators were granted an option to register and be taxed under either the annual flat tax or under the mileage tax provisions. They were not required to pay both.

The Motor Vehicle Law has at all times specifically provided that all taxes upon vehicles of the second division were imposed "for the use of the public highways" of the State. (Appendix I, Section 9.) By Section 36 of the Motor Vehicle Law (Ill. Rev. Stat. 1951, Chap. 95½, Sec. 50) all motor vehicle registration and license taxes collected are required to be set apart in a special "road fund" and used solely for construction, reconstruction, maintenance and patrolling of the public highways and administration of the Act.

The principal changes in the Motor Vehicle Law effected by the 1951 Act may be summarized, generally, as follows:

1. Effective January 1, 1952 the annual flat taxes for vehicles of the second division were increased with provision for further increases effective January 1, 1954.

2. The optional mileage weight tax was repealed thus subjecting all vehicles of the second division to the annual flat tax provisions.

3. Certain flat tax weight brackets were revised and new weight brackets added.

4. Separate weight brackets and tax rates were established for busses operating within municipalities or a close radius thereof.

We think it appropriate to point out here that the rate increases provided by the 1951 Act are the first significant or substantial increases in annual flat taxes on vehicles of the second division since the original enactment of the Motor Vehicle Law in 1919. For thirty-two years annual flat taxes on trucks, busses and trailers remained at substantially the 1919 level. These facts are illustrated by the chart appearing at page 309 of the Record (offered at R. 195). This chart does not reflect the addi-

tional taxes imposed from 1921 to 1935 upon a limited class of carriers for hire nor does it reflect the optional mileage tax in effect from 1935 to 1952. The insignificance of these omissions for present comparative purposes is illustrated by the fact that in 1951 there were only 151 carriers of the class affected by the additional taxes in effect from 1921 to 1935. (See *Bode et al.* v. *Barrett et al.*, No. 187; R. 227, offered at R. 78.) Obviously the class would have been much smaller in the earlier years 1921 to 1935. The small number of vehicles affected by the optional mileage weight tax is illustrated by the fact that in 1949 only 11,935 vehicles out of a total vehicle registration of 336,044 or about 3.5 per cent elected to pay the mileage tax rather than the annual flat tax. (R. 307, columns 1, 2 and 3; offered at R. 195.)

SUMMARY OF ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under Section 8 of Article I of the Federal Constitution.

In the court below appellants challenged the validity of the 1951 Act under the commerce clause of the Federal Constitution. The fact that the Illinois court decided this issue on the merits does not serve to qualify appellants to raise the issue in this Court. In this Court only those within the class as to whom the unconstitutional burden is claimed to exist may raise the objection. Appellants are all intrastate truckers. Some of them, in addition to their intrastate activities, engage in making interstate trips from Illinois into other states. An intrastate trucker pays no additional tax for engaging in interstate commerce and if he carried on no interstate operations he would still pay the same tax. Thus, no appellant is within the class of interstate carriers as to whom the unconstitutional burden is claimed to exist and no question concerning the validity of the 1951 Act under the commerce clause is properly before this Court.

II.

The 1951 Act does not impose an undue burden on interstate commerce in violation of Article I, Section 8, and Amendment XIV, Section 1 of the Constitution of the United States as asserted in Point IA of Appellants' brief.

Both the formula on which the 1951 Act is based and the resulting taxes imposed are rational, fair, reasonable and not in excess of fair compensation for the privilege of un-

limited use of the Illinois highways. In passing the 1951 Act the Illinois legislature adopted a tax schedule based upon a fair and reasonable theory calculated to equalize taxes paid by truck operators with those paid by passenger car operators on a ton-mile basis. The revenue which will be raised by the 1951 Act, together with revenue derived under the Motor Fuel Tax Act, will not exceed the State's needs for highway purposes but will equal only approximately sixty per cent of such needs.

The tax formula and schedule advocated by Worley, a witness for appellants, is based upon arbitrary assumptions and factors admitted by Worley to be highly controversial. In any event, the choice between two theories or formulae rests within the broad discretion of the legislature and is not subject to judicial review.

Appellants' argument that the taxes imposed by the 1951 Act discriminate against trucks in favor of passenger cars is unsupported in fact since the 1951 Act equalizes taxes paid by trucks with those paid by passenger cars. Further, this Court has specifically recognized the right of a state to separately classify and tax passenger carrying vehicles as distinguished from property carrying vehicles.

III.

The 1951 Act does not impose taxes excessive in amount and unconstitutional as asserted in Point IB of Appellants' brief.

The amount of the taxes imposed by the 1951 Act is reasonable and not in excess of fair compensation for the unlimited privilege of using the Illinois highways. The increases provided by the 1951 Act are the first substantial increases in motor vehicle license fees since 1919. The

State must receive additional revenue for highway purposes in view of increases in highway construction and maintenance costs and the vast expansion and improvement of the highway system. The taxes imposed by the 1951 Act are not the highest imposed by any state as asserted by appellants. In view of increased highway maintenance and construction costs and present inflationary dollar values it is unfair to compare the taxes imposed by the 1951 Act with those of other states approved or considered by this Court at an earlier period.

Examples of increases of taxes under the 1951 Act as applied to certain appellants are without significance. Appellants have failed to sustain the burden, which rested upon them, of establishing that the 1951 Act imposes an unconstitutional burden upon interstate commerce. Even if this Court should hold the 1951 Act to be invalid as applied to interstate operations nevertheless each of appellants would still be required to pay the tax on account of his extensive intrastate operations.

IV.

The taxes imposed by the 1951 Act are not confiscatory or violative of the Fourteenth Amendment of the Constitution of the United States.

Only 14 of the 54 appellants testified at the trial of this cause. There is no evidence in the record establishing that they are representative of a fair cross section of the many thousands of concerns engaged in trucking in Illinois and hence there is no factual support for appellants' assertion that the 1951 Act is confiscatory of the entire trucking industry of the State of Illinois. The fact that a tax may be burdensome or result in driving a particular taxpayer out

of business does not render the tax invalid under the Fourteenth Amentment. Where a legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed.

V.

The 1951 Act does not contain arbitrary, inconsistent, vague and uncertain classifications in violation of the Fourteenth Amendment.

Appellants assail nine separate provisions as arbitrary, inconsistent, vague and uncertain in violation of the Fourteenth Amendment. All such contentions were resolved adversely to appellants by the Supreme Court of Illinois and the same are without merit.

1. Subsections (h) and (i) of Section 9 of the 1951 Act are not inconsistent or overlapping. The evidence in the record shows that no four wheeled vehicles weighing in excess of 30,000 pounds have ever been found to be operating in Illinois except in a few cases, in each of which such vehicles were operating illegally in that the rear axle weight exceeded the limitation specified in Section 228 (a), Chap. 95½, Ill. Rev. Stat. 1951.

2. Subsections (i-3) and (i-4) of Section 9 of the 1951 Act are not overlapping and inconsistent. Vehicles having ten or more wheels are taxed under subsection (i-4) and not under subsection (i-3).

3. The provisions of the 1951 Act affording lower tax rates to certain passenger carrying busses operating within a municipality or a close radius thereof are not arbitrary or discriminatory. The separate classification and taxation of passenger carrying vehicles as distinguished from

freight carrying vehicles has been approved by decisions of this Court.

4. Appellants' contention that the 1951 Act does not tax a six or more wheeled vehicle under 30,000 pounds gross weight is without merit. Such a vehicle weighing from 24,000 to 30,000 pounds is taxable under Section 9 (i), one weighing from 20,000 to 24,000 pounds is taxable under Section 9 (h), and one weighing less than 20,000 pounds is taxable under preceding subsections of Section 9.

5. The requirement of the 1951 Act that the operator of a tractor designed to pull a semi-trailer pay a registration fee for the combined weight of the tractor and a semi-trailer is reasonable.

6. The terms "gross weight" and "maximum load" used in Section 9 of the Act are not vague, uncertain and incapable of understanding and the Supreme Court of Illinois has specifically found that those provisions have a well understood meaning and a continuity of legislative and administrative interpretation over a period of thirty-two years.

7. The phrase "like exemptions and privileges" appearing in Section 9 of the Act is not vague, uncertain and incapable of clear understanding. The legislature intended that the tax provisions of another state's laws be measured against the provisions of the Illinois law and such cannot be said to result in uncertainty.

8. The phrase "a close radius thereof" is not indefinite and uncertain. A definite and certain meaning has been ascribed thereto by the Supreme Court of Illinois and hence appellants' contention presents no question for review by this Court.

9. Appellants' contention that the phrase "agricultural pursuits" is vague and indefinite is without merit.

ARGUMENT.

I.

Appellants have no standing to challenge the 1951 Act under Section 8 of Article I of the Federal Constitution.

In point I of their brief (Appellants' Brief, pages 16 to 46) the appellants challenge the 1951 Act upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution. We think it well at the outset to call to the attention of the Court the fact that there is no appellant in this case entitled to challenge the Act under the commerce clause.

The appellants in this case (plaintiffs below) are fifty-four in number and all are engaged in extensive intrastate trucking operations within Illinois (R. 2, 3, 31, 32). Thirty-three of appellants are individuals who are residents of Illinois. Nineteen of appellants are corporations organized and existing under the laws of Illinois and two of appellants are foreign corporations licensed and qualified to do business in Illinois. All appellants maintain places of business in Illinois from which they conduct their intrastate operations making use of the Illinois highways. Some of the appellants, in addition to their Illinois intrastate operations, use their trucks in making interstate trips from Illinois into other states. Seven appellants testified that by virtue of Illinois license plates on their trucks they were granted reciprocity in other states into which they made trips and paid no license fees outside of Illinois (R. 46, 59, 60, 63, 67, 70, 79, 99). None testified that additional taxes were paid

to any other state for the privilege of using highways in interstate commerce.

Thus it will be seen that the appellants here seeking to claim an unconstitutional burden upon their interstate operations are all Illinois residents or concerns having places of business in Illinois from which intrastate operations are conducted. As such they make extensive use of the Illinois highways and are taxed on a parity with all other Illinois truck owners and operators. Some of appellants, in addition to their intrastate operations, have chosen to engage in making interstate trips from Illinois into other states, but in so doing such appellants are treated no differently taxwise from any other Illinois truck operator. The license fees which they pay to Illinois give them the full privilege of unlimited use of the Illinois highways for the registration period and, in addition, afford them reciprocity in other states into which they make interstate trips. The license fees paid to Illinois by appellants are neither increased nor diminished by reason of the fact that some of appellants engage in interstate as well as intrastate operations. Those appellants whose operations are wholly intrastate could commence interstate operations without the payment of additional taxes. Likewise, those appellants who are engaged in interstate operations could, if they chose, cease such operations but would nevertheless be required to pay the Illinois taxes because of the use of the Illinois highways in their intrastate operations.

Since all of the appellants are engaged in extensive intrastate operations in Illinois and are therefore required to pay the Illinois license fees irrespective of whether or not they engage in interstate operations, they are in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (page 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade*, 233 U. S. 642, 648; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

The fact that the Illinois courts may have considered on the merits the question of whether the 1951 Act constitutes an unlawful burden on interstate commerce does not serve to give the appellants in this case a right to raise that constitutional question in this Court. Despite the fact that a state court may pass on the merits of a constitutional question, an appellant, to be entitled to a review by this Court, must show that he is directly and personally aggrieved by the statute. This the appellants here cannot do. *Tyler* v. *Judges*, 179 U. S. 405, 410; *Smith* v. *Indiana*, 191 U. S. 138; *McCandless* v. *Pratt*, 211 U. S. 437; *Southern Railway Co.* v. *King*, 217 U. S. 524.

A case directly in point is *Miles* v. *Department of Treasury*, 209 Ind. 172; 199 N. E. 372 (appeal dismissed 298 U. S. 640), where appellants brought an action as taxpayers on behalf of themselves and others similarly situated to enjoin state officials from paying out state funds for the printing of the Gross Income Tax Act of 1933 on the ground that the statute was violative of both the State and Federal Constitutions. The Supreme Court of Indiana considered the

claims of unconstitutionality on the merits and upheld the validity of the Act. In dismissing the appeal this Court said (298 U. S. 640):

> "The appeal herein is dismissed upon the ground that the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406, 407, 410; *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550."

II.

The 1951 Act does not impose an undue burden on interstate commerce in violation of Article I, Section 8, and Amendment XIV, Section 1 of the Constitution of the United States as asserted in point IA of Appellants' Brief.

In point IA of their brief appellants contend that the 1951 Act amounts to an unlawful burden on interstate commerce in violation of the commerce clause and also the equal protection clause of the Fourteenth Amendment of the Federal Constitution. We will first answer the appellants' claims under the commerce clause and, secondly, their contentions under the equal protection clause of the Fourteenth Amendment.

Appellants' claims under the commerce clause.

We have shown in point I, above, that the appellants, because of their intrastate operations in Illinois are not members of the class as to whom the unconstitutional burden on interstate commerce is claimed to exist and hence have no standing to challenge the 1951 Act under the commerce clause. However, we will demonstrate that, considered on

the merits, their contentions as to the existence of an unconstitutional burden on interstate commerce are without foundation.

At page 18 of their brief appellants refer to the case of *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542. They assert that the State erroneously contends the *Brice* case establishes the proposition that whether a state motor vehicle tax imposes an unconstitutional burden on interstate commerce is to be determined by considering the result of the tax rather than the formula fixing the tax. Appellants continue their argument on pages 19, 20, and 21 in an attempt to demonstrate that such is not in fact the holding of the *Brice* case. Immediately thereafter, with startling inconsistency, appellants make the following statements:

> "It seems obvious that if a legislature devised a tax schedule based on an improper formula, or, indeed, based on no formula at all, and that schedule did in fact by chance bear a reasonable relationship to the value of the privilege granted, that tax would be every bit as valid as one based on a reasonable, logical and valid formula." (Appellants' Brief, pp. 21, 22.)

> "In the *Brice* case the Court has clearly stated that the Court will determine whether the resulting tax schedule bears a reasonable relationship to the value of the privilege granted without regard to the formula used by the legislature in arriving at that result." (Appellants' Brief, p. 22.)

We think it only necessary to point out that in the *Brice* case this Court said (339 U. S. 542, 545):

> "Later, in rejecting contentions that the validity of taxes must be determined by formula rather than result, the Court held that a flat fee on the privilege of using state highways 'is not a forbidden burden on interstate commerce' unless 'unreasonable in amount.' *Morf* v. *Bingaman*, 298 U. S. 407, 412. See also *Aero Transit Co.* v. *Comm'rs*, 332 U. S. 495, and annotation thereto, 92 L. Ed. 109, 119-120. Yet clearly a flat fee

> is not geared to mileage, weight or any other factor relevant in considering the fairness of compensation for road use. Thus, unless we are to depart from prior decisions, the Maryland tax based on the cost of the vehicles should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted."

However, we believe that extended discussion of the holding of the *Brice* case is unnecessary for we will demonstrate that both the formula on which the 1951 Act is based and the resulting taxes imposed are rational, fair, reasonable and not in excess of fair compensation for the privilege of unlimited use of the Illinois highways.

The evidence on behalf of the State shows without dispute that in passing the 1951 Act the Illinois General Assembly fixed the tax rates in accordance with the findings and recommendations of a study made by the Illinois Department of Public Works and Buildings. This study and the evidence in support of the same were presented at the trial by Frank N. Barker, Chief Highway Engineer of the Department of Public Works and Buildings (R. 152-162; 180-205). Mr. Barker identified and explained Defendants' Exhibit 7[1] (R. 307; offered at R. 195) as having been prepared under his direction and supervision. This exhibit is a statistical table reflecting in detail calculations made to equalize payments of motor vehcle license fees and motor fuel taxes[2] by operators of trucks, busses and other vehicles of the second division with those made by operators of passenger cars on a ton-mile basis. In his testimony Mr. Barker gave

---

[1] Defendants' Exhibit 7 in this case is the same document as Defendants' Exhibit 2 in *Bode et al* v. *Barrett et al*, No. 187. (R. 188)

[2] The Motor Fuel Tax Law imposes a tax "on the privilege of operating motor vehicles upon the public highways of this State", at specified rates per gallon of fuel consumed in vehicles upon such highways. (Ill. Rev. Stat. 1951, Chap. 120, Sec 418). Section 8 of that Act (Chap. 120, Sec. 424) requires that all taxes collected under the Act be placed in a special fund in the State Treasury to be known as the "Motor Fuel Tax Fund" and devoted to public highway purposes.

an explanation of the various columns and calculations reflected on Defendants' Exhibit 7 (R. 307; offered at R. 195). His testimony in this regard appears at pages 183 to 186 of the Record. A summary of this evidence is set forth in the opinion of the Supreme Court of Illinois in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 215-216.

The study established that Illinois passenger car operators paid motor vehicle license taxes and motor fuel taxes (the proceeds of which are used exclusively for highway purposes) equivalent to $0.00251 per ton-mile of travel per vehicle (R. 307, Column 17; offered at R. 195). The study further showed that, except with respect to trucks of 3,000 pounds or less gross weight, motor truck operators were paying substantially less taxes per ton-mile than were passenger car operators. In making such calculations it was necessary to take into consideration the average miles travelled per year by the various weight classifications of vehicles. The source of such annual average mileage figures was summarized by the Supreme Court of Illinois in its opinion in the *Bode* case, 412 Ill. 204, 215, as follows:

> "These figures were taken from a comprehensive report made in 1948 covering the Illinois highway problem by an independent engineering concern employed by the State of Illinois for that purpose.
>
> From evidence introduced at the trial, such average travel-per-year figures were based on the results of a questionnaire survey of motor vehicle owners and operators made in the late thirties in Illinois and other States, as were other figures used, such as fuel consumption, modified as justified by later information."

The study then proceeded to determine what amounts of annual motor vehicle flat taxes should be paid with respect to the various weight classifications of trucks in order to equalize the ton-mile payments of motor vehicle taxes and

motor fuel taxes by truck operators with those paid by passenger car operators.

The results of the study, in summary form, are shown in the following table taken from Defendants' Exhibit 7 (R. 307; offered at R. 195):

	Trucks	Average Travel Per Year (4)	License Fee as Equalized (22)	License Fee S. B. 96 Effective Jan. 1, 1954 (23)
A	3000# and less	7,500	$ 1.62	$ 5.00
B	3001# to 8000#	10,000	21.29	21.00
C	8001# to 10000#	12,500	57.66	58.00
D	10001# to 12000#	16,000	87.11	87.00
E	12001# to 14000#	18,500	113.89	114.00
F	14001# to 16000#	20,500	141.24	141.00
G	16001# to 20000#	23,500	215.89	216.00
H	20001# to 24000#	28,000	351.96	352.00
Bus	24000# to 36000#	30,000	545.60	545.00
X	24001# to 41000#	36,500	809.67	588.00 810.00 890.00
K	41001# to 45000#	36,500	979.61	980.00
L	45001# to 50000#	36,500	1,097.96	1,098.00
N	50001# to 59000#	36,500	1,244.81	1,245.00
P	59001# to 72000#	36,500	1,587.98	1,588.00

The left hand column indicates the various weight classifications of vehicles. The second column numbered "4" shows the average annual mileage figures used in making the calculations contained in the study. The third column numbered "22" shows the amount of the annual license fee for each weight classification required to accomplish equalization with passenger cars. The fourth column numbered "23" reflects the schedule of license fees effective January 1, 1954 as adopted in the 1951 Act.

It will be seen from the foregoing that, with immaterial modifications, the Illinois legislature in passing the 1951

Act adopted the schedule of license fees resulting from the equalization study and a finding to this effect was made by the Supreme Court of Illinois in the *Bode* case, 412 Ill. 204, 216:

> "Flat license fees per weight bracket as adopted by the 1951 amendment apply and adopt the license fees as thus equalized, rounded out to the nearest dollar."

It should be noted that the taxes imposed by the 1951 Act will not produce revenue in excess of the State's needs for highway purposes. The evidence demonstrates that during the 1951-60 period the State will have a total need for $1,151,041,232.00 for highway purposes (Defendants' Exhibit 2a; R. 293; offered at R. 158) and that the revenue produced by the 1951 Act, together with taxes collected under the Motor Fuel Tax Act will yield a net amount available for highway purposes of only $676,961,887.00 (Defendants' Exhibit 2 b; R. 294; offered at R. 158), leaving a deficiency of $474,079,345.00 (R. 293, 294). This fact was confirmed by the Supreme Court of Illinois which stated in its opinion in the *Bode* case, 412 Ill. 204, 228:

> "The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty percent of the revenues needed by the State for maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used."

Appellants do not question that the total revenue calculated to be raised by the 1951 Act is reasonably required to meet state highway needs (Appellants' Brief, page 4).

The argument of appellants in Point IA of their brief is bottomed principally upon the testimony of one Worley. Witness Worley is a former professor of the University of Michigan who, since his retirement from academic ac-

tivities some five or six years ago, has been employed or identified with numerous state trucking associations (R. 133, 134). By his testimony this witness propounded a formula for calculating motor vehicle license fees based in part on the ton-mile theory and in part on an average annual vehicle-mile basis. As indicated on page 23 of the Appellants' Brief, the calculations of this witness were presented in six exhibits which he had prepared (Plaintiffs' Exhibits 11 through 16, inclusive; R. 265-276; offered at R. 133) and which were based in large part on the same data as used in Defendants' Exhibit 7 (R. 307; offered at R. 195). In his calculations Worley accepted and used all of the basic statistical information shown in Defendants' Exhibit 7 (R. 307; offered at R. 195), including the vehicle registration figures, average mileage figures and statistics relating to gasoline consumption and motor fuel tax revenue.

Worley's theory or formula is based upon the assumption that certain highway construction and maintenance costs are attributable to the weight of the vehicles while other such costs are not attributable to weight. Pursuing this basic assumption Worley arbitrarily allocated certain construction and maintenance costs on a percentage basis between factors which he considered to be attributable to weight and factors not attributable to weight. The percentage allocation of the various items are indicated in table form on page 30 of appellants' brief. The portion of the total highway costs which Worley attributed to weight he then distributed back among the various vehicle classifications, including passenger cars as well as trucks, on a ton-mile basis. The portion of the highway costs which he considered were not attributable to weight he distributed back among all vehicles, including passenger cars,

on a straight vehicle-mile basis, using for this purpose the State's annual average mileage figures appearing in Defendants' Exhibit 7 (R. 307; offered at R. 195). As a result of his calculations Worley arrived at a tax schedule which is reflected in column 8 of Plaintiffs' Exhibit 15 (R. 273; offered at R. 133). The net result of Worley's calculations is a tax schedule which, as contrasted with the Illinois license fees in effect prior to the 1951 Act, would accomplish the following—the tax on pleasure cars would be more than doubled; the tax on trucks in the lighter classifications would be increased; and the fees on trucks in the heavier classifications would be only slightly increased and in some cases reduced. The reason for the difference between the tax schedule proposed by Professor Worley and that adopted by the Illinois legislature in the enactment of the 1951 Act is apparent when it is considered that with respect to many items of highway costs Worley attributed from 40 to 100 per cent as "not due to weight" and allocated such expenditures to all vehicles on a straight average per annum vehicle-mile basis.

Appellants assert at page 22 of their brief that Worley's testimony was offered "not as a substitute formula for the legislature, but to demonstrate how the formula was misapplied, and as a competent yardstick for the Court to use in determining whether the result was proper, and bore relation to the value of the privilege granted." We think it is apparent, however, that appellants and witness Worley are in fact proceeding upon the theory that the formula used by Worley for calculating motor vehicle license fees is the *only* proper or rational theory or formula upon which a motor vehicle tax schedule can be based; that the tax schedule adopted by the Illinois legislature as embodied in the 1951 Act differs from the theory or formula

advanced by Worley and hence is arbitrary, unreasonable and unconstitutional. In referring to Plaintiffs' Exhibit 15 (R. 273; offered at R. 133), which as we have mentioned above, contained the proposed tax schedule arrived at as a result of Professor Worley's calculations, he made the bald assertion:

> "It is my opinion that any tax schedule which does not come out with the various figures which I have listed here under column 8 is an irrational tax schedule" (R. 143).

He made the foregoing assertion despite the fact that throughout his testimony on cross-examination he admitted his theory of allocation of construction and other highway costs is highly controversial. For example, Worley testified that the allocation of highway costs among different classes of vehicles is a controversial subject and has been for a number of years and that highway engineers have differed on this subject in the past and still do differ (R. 134). He further testified that whether the allocation of construction costs as between items due to weight and items not due to weight is the generally accepted view among highway engineers was not known to him and that he did not know what their views were (R. 141, 142). He also admitted that his allocation of construction costs as 60 per cent due to weight and 40 per cent not due to weight was his best judgment but that he could cite qualified engineers who would not make the same allocation (R. 142). In addition, he admitted that his allocation of administrative expenses and his allocation of interest were both controversial (R. 142) and that in Plaintiffs' Exhibit 14 (R. 271; offered at R. 133) he had allocated the item "Other" as being entirely not due to weight although he did not know what items were included under this heading (R. 142, 143). Worley further admitted that under his theory the alloca-

tion of such items as "Right-of-way" might be considered controversial and in fact that "everything could be controversial" (R. 143). In referring to the ton-mile theory adopted by the State, Worley contended that it was unsound but at the same time admitted there is a great difference of opinion about it among highway engineers; that he didn't know to what extent the ton-mile theory of calculating costs has support among highway engineers; and that it is a controversial subject (R. 145).

On the contrary, Mr. Barker, Chief Highway Engineer of the State of Illinois, testified for the State that the ton-mile theory has general acceptance among highway engineers as a valid theory and that in his opinion it is a valid theory of cost allocation (R. 186-188). Mr. Barker further testified he did not agree with Worley that an allocation can properly be made as between items due to weight and those not due to weight (R. 189). He also stated that his opinion in this respect found support among competent authorities in the highway engineering division and he cited and quoted at length from several authorities who criticized the validity of a theory such as that advanced by Worley (R. 189-194).

Analyzing the testimony of Worley, the most that can be said for it is that he advanced a theory or formula for calculating motor vehicle taxes different from the ton-mile theory as explained by witness Barker and as adopted by the Illinois legislature in the 1951 Act. Worley himself admitted his theory to be highly controversial and not in accord with the opinion of a substantial number of highway engineers. On the other hand, Mr. Barker testified that there is a substantial body of expert highway engineers opinion favoring the ton-mile theory and opposing the allocation theory advanced by Worley.

The net of the evidence in the record is that two theories of calculating a schedule of motor vehicle license fees have been advanced, one by the appellants and one by the State. It is apparent that such a situation leaves room for legislative judgment and it is also apparent that which theory is to be selected is within the province of the legislature and not the courts. The legislature has a broad range of discretion and is free to adopt the theory it believes most sound without judicial interference.

In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute forbade operation of any motor vehicle carrying a net load of freight exceeding seven thousand pounds. This was attacked as violative of the Commerce Clause and the Fourteenth Amendment of the Constitution. It was contended that the net load limitation as contrasted with a possible gross load limitation, was "opposed to sound engineering opinion" and hence invalid. In overruling this contention this Court said (page 388):

> ". . . Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."

Again this Court, in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, in discussing factors involved in state motor vehicle tax formulas, said:

> "These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.'"

Also in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, this Court said at page 594:

> ". . . Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce."

Further, we call attention to the fact that the Supreme Court of Illinois, in the *Bode* case, 412 Ill. 204, made the following finding of fact at page 228 of its opinion:

> "The evidence clearly discloses that the Motor Vehicle Law and the Motor Fuel Tax Act impose taxes which will produce approximately sixty per cent of the revenues needed by the State for the maintenance, improvement and construction of State highways in the next several years, and under the terms of said acts such revenues must be so used. It also appears that the Motor Vehicle Law imposes a tax on trucks graduated according to weight bracket which, when combined with the motor fuel taxes paid, will approximately equalize the taxes paid per ton-mile of all motor vehicle operators, passenger and truck. The taxes imposed by the amended act have a reasonable basis, are not discriminatory, and do not produce a revenue in excess of fair and reasonable compensation for the privilege of using the State roads. The act is not arbitrary nor discriminatory in violation of the due process clauses of either the Federal or State constitutions."

We submit, there is nothing novel in framing a state motor vehicle tax law on the ton-mile theory. This Court has heretofore sustained annual lump sum state vehicle taxes graduated in amount in accordance with vehicle weight irrespective of miles traveled. *Hicklin* v. *Coney*,

290 U. S. 169; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72; *Clark* v. *Poor*, 274 U. S. 554. Also this Court has sustained against attack under the commerce clause a state tax based upon gross ton-miles traveled by the vehicle. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352. While it is true that the underlying theory of the tax imposed by the 1951 Act involves average annual miles traveled by vehicles classed according to weight and not actual mileage traveled by each individual vehicle, it should be noted that appellants do not complain of the State's tax formula on this account. In fact, the Worley theory or formula promulgated by appellants accepts and uses the same annual average mileage statistics as are involved in the State's calculations.

At pages 16 to 18 of their brief appellants cite and rely upon *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, *Prouty* v. *Coyne*, 55 F. 2d. 289, and *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, and at page 36 of their brief appellants state that in each of these cases a state motor vehicle law was declared unconstitutional "because the formula used produced a tax that was not an accurate measure of the benefit received from the use of the state's highways". We submit that appellants misinterpret the holdings of these cases.

A careful reading of *Sprout* v. *South Bend*, 277 U. S. 163, and *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, in the light of the subsequent holdings of this Court in *Hicklin* v. *Coney*, 290 U. S. 169, 173, and *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 504, demonstrates that the state vehicle taxes in the *South Bend* and *Lindsey* cases were stricken down not on the basis that the formula involved in the tax was improper but rather because of the fact that each of those cases in-

volved a tax laid "not as compensation for the use of the highways but for the privilege of doing the interstate bus business". *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495, 504.

Prouty v. *Coyne*, 55 F. 2d 289, was a decision in 1932 by a statutory three-judge United States District Court for South Dakota. The opinion was written by United States Circuit Judge Gardner. The court's decision is clearly contrary to *Hicklin* v. *Coney* (1933), 290 U. S. 169, and other later decisions of this Court. This was clearly recognized by Judge Gardner and other judges of the Eighth Circuit in *Brashear Freight Lines* v. *Public Service Commission of Missouri* (1938), 23 F. Supp. 865. The *Brashear* case was likewise decided by a statutory three-judge court. There certain truckers complained that the Missouri license fee was invalid because it was a flat annual tax not apportioned to mileage traveled in the state. The court, in a *per curiam* opinion, Judge Gardner participating, said (868):

> "It is next contended that the fees are invalid as a matter of law because they are assessed on a flat rate annual basis, do not vary according to mileage traveled, and are not predicated upon the use made of the highways. In effect this is the same contention considered above. In addition to that which has already been said on the subject it is appropriate to note that the fees assessed are asserted by the Legislature to be for the sole purpose of maintenance, and proper care of the highways. . . . Under the facts of this case such cases as *Ingels* v. *Morf*, 300 U. S. 290, . . . *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, . . . and *Sprout* v. *South Bend*, 277 U. S. 163, . . . are inapplicable."

The inapplicability of the *McCarroll* case, 309 U. S. 176, to a situation involving a state motor vehicle tax laid for

the purpose of exacting compensation for the use of the highways of the state is made clear by this Court's decision in *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U. S. 495, 504.

In addition to the foregoing, appellants, at page 17 of their brief, cite and rely upon *Ingels* v. *Morf,* 300 U. S. 290. In that case the State of California imposed a license fee and the statutory enactment recited that the fee was a charge for regulating traffic. This Court held the charge excessive as a purely regulatory fee. Thereafter the Legislature of California repassed the Act and in the amended act recited that the fee was both for regulating the traffic and to provide funds for constructing and maintaining the highways. Subsequently this Court held the amended act valid in *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583.

Appellants' Claim Under the Equal Protection Clause.

Although appellants' reasoning is obscure it is apparent from the heading of point I of their brief and the quotation from Section 1 of Amendment XIV appearing in the argument on page 16 of their brief, that they contend the 1951 Act is violative of the equal protection clause of the Fourteenth Amendment. Appellants cite no authority in support of this contention. All decisions cited in point IA of their brief concern the validity of motor vehicle taxes under the commerce clause.

From the concluding paragraph of point IA on page 38 of their brief it appears appellants' contention is that the 1951 Act discriminates against trucks in favor of passenger cars. We have shown above that such discrimination does not in fact exist because the 1951 Act is framed upon the basis of equalizing the total taxes paid by trucks with those paid by passenger cars.

In any event appellants' point is without merit. This Court in *Sproles* v. *Binford*, 286 U. S. 374, sustained the propriety of separate classification of passenger-carrying vehicles as opposed to freight-carrying vehicles, saying (page 396):

> "But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none."

See also, *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U. S. 285, 287, 290.

III.

The 1951 Act does not impose taxes excessive in amount and unconstitutional as asserted in point IB of Appellants' brief.

In point IB of their brief appellants urge that the taxes imposed by the 1951 Act are so unreasonable and excessive in amount as to constitute an undue burden on interstate commerce.

In considering the amount of the taxes imposed by the 1951 Act we again call attention to the fact mentioned above at page 4 of this brief that the rate increases provided by this Act are the first significant or substantial increases which have been made in license taxes for vehicles of the second division since the original enactment of the Motor Vehicle Law in 1919. The foregoing is illustrated by the chart appearing at page 309 of the Record (offered at R. 195).

It is, of course, a well known fact, of which this Court will take judicial notice, that over the last 35 years costs of construction and maintenance of highways have tremendously increased, apace with the increase in all other industrial costs and cost of living. It is also a fact known to everyone that during this period the highway systems of Illinois and all states of the United States have been vastly increased, expanded and improved. The day of the early single-lane highway is long past and we are now in the era of vast networks of wide superhighways and speedways accommodating many millions of passenger cars, passenger busses and freight carrying vehicles of all types from the small delivery truck to the huge transcontinental freight-carrying vehicles. Obviously, if Illinois is to keep abreast of this national trend in highway expansion and improvement it cannot do so on an income based upon motor vehicle license fees fixed at "horse and buggy" levels. These facts have been the subject of extensive hearings and detailed reports by committees of the Congress. See Report of Joint Committee on the Economic Report entitled *"Highways and the Nation's Economy"*, 81st Congress, 2d Session, and *"Highway Needs of the National Defense"*, House Document No. 249, 81st Congress, 1st Session. The Supreme Court of Illinois, in its opinion in the *Bode* case, 412 Ill. 204, said at page 234-235:

> "The General Assembly took legislative cognizance, and we take judicial notice, not only of the increase in cost of all types of construction since the early days of the automobile, but, likewise, that modern trucks and busses are much heavier, travel much faster, and are far more numerous than they were in those early days. The heavy cost of maintaining the State's arteries of transit must be borne by someone. The General Assembly could, as it did, place a large share of this burden of expense upon those who own and operate such heavy vehicles as trucks and busses."

We again emphasize that in increasing its motor vehicle license taxes on trucks, busses and like vehicles Illinois adopted a fair and rational scheme of taxation based on the equalization of taxes paid by such vehicles on a ton-mile basis with those paid by passenger cars. The tax has an eminently fair classification basis and, as we have shown, does not produce, when considered in conjunction with the motor fuel tax, more than the needs of the State for its highway program. In fact, the proceeds of the tax will produce only approximately 60 per cent of the State's highway maintenance and construction cost requirements.

At page 38 of their brief appellants assert "there is no known tax relating to motor vehicles that approaches in amount the tax involved in this litigation". There are two answers to this assertion.

First, the opinions of this Court make it apparent that the touchstone of validity of a motor vehicle tax under the commerce clause is whether or not the tax exceeds fair compensation to the State for the privilege of road use granted. Obviously the mere fact that the tax of a particular state may be higher than that imposed by other states does not demonstrate that such tax exceeds fair compensation for the privilege of unlimited use of the state's highways.

Second. Appellants' assertion is not true. In Appendix I attached to this brief we have applied the taxes of two other states to the operations of two of the appellants and have demonstrated that the taxes imposed by such other states exceed or closely approach those imposed by the Illinois Act. The two appellants—Cecil Kain and Koehler Transfer—with respect to whom comparisons are made in Appendix I, were chosen for the reason that they are the only appellants with respect to whom the evidence in the record is sufficiently specific as to number and weight of vehicles and mileage travelled to permit precise application of the laws of other states. In addition, in Appendix I we have demonstrated that on the basis of the weight classifications and average annual mileages used by the State in making its equalization study (Defendants' Exhibit 7, R. 307; offered R. 195) and by witness Worley in his testimony for the appellants (R. 124, 125, 134), the taxes of at least one other state exceed or closely approach those of Illinois.

Appellants point out at pages 39 and 40 of their brief that the tax of $1588 imposed by the 1951 Act on the huge vehicles in the 50,000 to 72,000 pounds class is considerably higher than any tax heretofore litigated under the commerce clause and sustained by this Court. It should be noted, however, that for the most part the taxes previously approved by this Court to which appellants refer were involved in cases decided commencing as early as 1915 (*Hendrick* v. *Maryland*, 235 U. S. 610).

As we have pointed out above, over the last 30 to 35 years there has been a tremendous increase in highway construction and maintenance costs and a vast expansion of the entire national highway system. These factors, together with the present day inflationary value of the dollar, render impossible a fair comparison between taxes imposed by

other states in a much earlier period and present Illinois taxes. It is obviously irrational to compare, as appellants do, a 1933 tax of $400 (*Hicklin* v. *Coney*, 290 U. S. 169) with a $1588 tax in 1954.

It should also be noted that the $1588 tax of which appellants complain so bitterly is applicable only to the largest and heaviest type of vehicles, namely ten wheeled vehicles in the 50,000 to 72,000 pounds weight bracket. Further, the record in this case does not disclose that any of the appellants have or intended to register vehicles in this weight classification. For many years the size and weight of trucks in Illinois have been limited by the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1951, Ch. 95½, Sec. 221). Prior to 1945 trucks weighing in excess of 40,000 pounds were not permitted to use the Illinois highways either in intrastate or interstate commerce. This Court has sustained such prohibitory regulations and has affirmed the right of a state to adjust its license fees in furtherance of the same purpose. In *Hicklin* v. *Coney*, 290 U. S. 169, this Court said (page 173):

> "Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways. It is for this reason that the authority of the State to impose directly reasonable limitations on the weight and size of vehicles, although applicable to interstate carriers, has been sustained. *Morris* v. *Duby*, 274 U. S. 135, 143; *Sproles* v. *Binford*, 286 U. S. 374, 388, 389. As the State may establish such regulations directly, the State may adjust its license fees, otherwise valid as being reasonable and exacted as compensation for the use of the highways, according to carrying capacity in furtherance of the same purpose."

Illinois, if it chose, could again prohibit trucks in this class from using the Illinois highways in both intrastate and

interstate commerce. We submit, therefore, that appellants are in no position to complain of the $1588 fee which, as we have shown, was fixed on a fair and rational basis in equalizing truck taxes with passenger car taxes.

At page 42 of their brief appellants cite examples of the tax increases resulting from the 1951 Act as applied to twelve handpicked cases out of the total of 54 appellants in the case. Appellants' position appears to be that the taxes imposed by the new Act are invalid *per se* because the increases on a percentage basis in some cases are large. But it must be borne in mind that in the two examples emphasized (Co-ordinated and Wagner Transfer Co., appellants' brief, pages 42, 43) and in other examples, the trucking concerns previously paid taxes, wholly or in part, under the mileage weight tax option. Prior to its repeal by the 1951 Act the mileage weight tax option was available to all truckers. That it was advantageous to only a very small percentage of trucking concerns is demonstrated by the fact that in 1949, for example, only 11,935 vehicles out of a total 336,044, or about 3.5 per cent, were registered under the mileage weight option (R. 307, columns 2 and 3; offered at R. 195). Obviously truckers availing themselves of the mileage weight option operated under unusual circumstances and covered only very small annual mileage in Illinois.

The Illinois legislature has seen fit to repeal the mileage weight option and to tax all truckers alike on an annual flat fee basis. This Court has repeatedly recognized the "administrative difficulties" in collecting taxes on a mileage fee basis and has on many occasions held that vehicle license fees to be valid need not be framed on the basis of mileage taxes. *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 295 U. S. 285; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542; *Aero Mayflower Transit Co.*

v. *Railroad Comm'rs.*, 332 U. S. 495; *Hicklin* v. *Coney*, 290 U. S. 169. In any event the amount of the taxes imposed by the 1951 Act may not be said to be unreasonable on the basis of a comparison of the same with the schedule of taxes in effect immediately prior to the adoption of the 1951 Act. The fact is that the appellants here and all truckers in the State of Illinois have for many years been paying taxes at ridiculously low rates fixed substantially at 1919 levels.

The burden of proof rested on the appellants to establish the unreasonableness of the fees as a burden on interstate commerce. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 548; *Clark* v. *Paul Gray, Inc.*; 306 U. S. 583, 599; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251. We submit that this burden has not been discharged by any evidence in the record in this case.

At page 43 of their brief appellants make great point of the plight of the Alton Box Board Co. whom they say in 1952 will be required to pay the State of Illinois $29,509 and in 1954 a total of $41,050 "for traveling three miles on the Illinois highways". Appellants attempt to make it appear that the only use of the Illinois highways made by Alton Box Board Co. is in travelling from its plant to the Illinois state line, a distance of one and one-half miles, on trips to St. Louis and again traversing the same one mile and a half on the return trip. A reading of the record (pages 61 to 65) will demonstrate that this is a gross understatement of the facts. Mr. Walter Klasner, manager of the Alton Box Board Co., testified that in 1951 the company's trucks operated a total of *one million miles* in the State of Illinois and approximately another *million miles* outside the state. It is true that some of this Illinois mileage was made up from trips to and from St. Louis, Missouri.

However, in addition the company does extensive other trucking entirely within the State of Illinois (R. 62). It is clear that the taxes paid to Illinois by this company afforded reciprocity and that for the million miles of non-Illinois travel it pays no taxes to Missouri or other states (R. 63). The unreasonableness of the position of this appellant is made apparent when it is considered that they operate 45 tractors, 110 trailers, two pickup trucks and one panel truck a total of two million miles per year (R. 61) yet feel that the $11,000 tax (approximately one-half cent per mile) paid in years prior to the effective date of the 1951 Act is too high. Klasner testified, "I think that $11,000 was too high a tax to pay for two million miles travel several years prior to 1951" (R. 64). At the same time this witness was unable to state the total amount of business done by his company or what percentage of total expense the $11,000 tax paid in 1951 and prior years bore to total operating expenses (R. 64). It is apparent that this appellant is "constitutionally" opposed to the payment of taxes.

There is no showing whatsoever in this record that the $1588 tax or any other amount in the tax schedule of the 1951 Act does in fact amount to a burden on interstate commerce or in any manner impinge upon or deter the carrying on of such commerce. The fact is that if this Court were to hold the taxes imposed by the 1951 Act invalid as applied to interstate operations, nevertheless every one of the appellants in this case would still be required to pay the full amount of the tax because of the extensive intrastate operations which they carry on. Hence, we submit, it cannot be said that because a few of the appellants in addition to their intrastate activities engage in some interstate trips, the interstate phase of their business is burdened by this tax.

IV.

The taxes imposed by the 1951 Act are not confiscatory or violative of the Fourteenth Amendment of the Constitution of the United States.

In Point II of their brief, pages 46-64, appellants argue that the taxes imposed by the 1951 Act are confiscatory and hence violative of the due process clause of the Fourteenth Amendment. In summary, the appellants contend that in some instances the motor vehicle taxes they are required to pay, including the tax increases imposed by the 1951 Act, exceed the net profits they have realized in the past and the net profits which they estimate they will make in the future. Appellants further contend they are a representative cross section of the entire trucking industry in the State of Illinois and that hence the 1951 Act is confiscatory of the entire trucking industry and invalid under the Fourteenth Amendment.

We will demonstrate that appellants' contentions are unsupported in fact and without merit in law.

Only 14 of the 54 appellants testified at the trial in this cause. These fourteen were the only trucking concerns with respect to whom evidence was introduced. Not one of these witnesses testified that the increased taxes provided by the 1951 Act would force his concern to go out of business. As pointed out in appellants' brief, a few witnesses did testify as to the net profits which have been realized by their concerns in the past and made estimates as to future annual net profits. In some cases they stated that the increased taxes required to be paid under the 1951 Act would exceed their past or estimated future net profits. It is on the basis of this testimony alone that appellants

contend the entire trucking industry in the State of Illinois is to be confiscated or destroyed. A flimsier factual foundation upon which to base such a bold assertion can hardly be conceived.

There is a complete absence of testimony and documentary evidence in the record in this case to the effect that the appellants' witnesses or their trucking concerns are representative of or a cross section of the forty appellants who did not testify or of the many thousands of other non-plaintiff concerns engaged in trucking in Illinois. Neither is there any evidence to the effect that the taxes imposed by the 1951 Act will exceed the net profits realized by the other thousands of trucking concerns or that the Act will force any trucking concerns, including the appellants, to go out of business.

Appellants have indicated at page 50 of their brief that at the trial they were prevented from introducing additional testimony as to the effect of the Act on other trucking concerns, and in this connection they refer to page 91 of the record. A reference to the record, page 91, and, in fact, a reading of the entire record, will demonstrate that although the appellees objected to the materiality of the appellants' evidence, the objection was not sustained and the trial court did not in any way limit the type or amount of testimony which the appellants were allowed to introduce.

At page 52 of their brief appellants admit that the mere fact a tax, as applied to an individual, may put such individual out of business, does not render the tax unconstitutional and void. However, they say that if the effect of the tax "on the industry as a whole" is prohibitory or confiscatory the tax is unconstitutional. We submit there is not a scintilla of evidence in the record in this case that

any trucking concern will go out of business because of the taxes imposed by the 1951 Act. Neither is there any evidence that the effect of the tax will be prohibitory or confiscatory as to the trucking industry generally.

The argument of appellants to the effect that it is impossible for members of the trucking industry to pass on to their customers the increased taxes provided by the 1951 Act (Appellants' brief, pages 63, 64) requires but little comment. As this Court is well aware, regulatory bodies that fix rates for public utilities and carriers are required to allow such utilities and carriers a fair rate of return on their investment after deduction of all operating expenses, including taxes. Every witness who testified in this case for appellants admitted that during the past fifteen or twenty years all of his operating expenses, with the exception of motor vehicle license fees, had increased substantially. Apparently the trucking industry was able to absorb such increases in operating expenses or to increase its rates to compensate for the same. The record in this case discloses no reason why the increased motor vehicle license fees provided by the 1951 Act cannot be offset by the trucking industry in the same manner as they have previously offset other increases in operating expenses.

The most that can be said for the appellants' evidence is that as to a few handpicked marginal operators the tax may be somewhat burdensome. If it were the law that a tax becomes unconstitutional if it is so large in amount as to cause a particular concern to cease business operations, it would be difficult to imagine a tax statute not subject to constitutional infirmity. It is common knowledge that in recent years property, license, income and all forms of taxes have increased substantially. In the case of any tax increase there are or may be marginal operators with re-

spect to whom the increase may cause hardship. Tax increases in many individual instances may be burdensome and result in driving certain taxpayers out of business. But such has never been held to support a constitutional objection under the Fourteenth Amendment.

At pages 58 and 59 of their brief appellants express some doubt as to whether the 1951 Act is a regulatory measure or a tax for revenue purposes. All doubt in this regard has been dispelled by the decision of the Supreme Court of Illinois in this case wherein the court stated (412 Ill. 321, 329; R. 322):

> "Recognizing the realities of the Motor Vehicle Act, it constitutes both a regulation of motor vehicles and use of the highways under the police powers of the State and also the imposition of a privilege tax on motor vehicles for the privilege of using the highways as a revenue measure."

It is well established by numerous decisions of this Court that where the legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed. Perhaps the leading case is *McCray* v. *United States*, 195 U. S. 27. There this Court held that the Congress had power to lay a tax on colored oleomargarine and the fact that the tax was so great as to destroy the business of dealing in colored oleomargarine did not affect the validity of the act. This Court said (pages 60, 61):

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases, *(Spencer* v. *Merchant,)* [125 U. S. 345, 355]

that 'the judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In *Magnano* v. *Hamilton*, 292 U. S. 40, in upholding the validity of a statute of the State of Washington imposing a large excise tax on butter substitutes sold within the state, this Court said (pages 44-47):

"Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329; *Heiner* v. *Donnan*, 285 U. S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Child Labor Tax Case*, 259 U. S. 20, 37 *et seq.*; *McCray* v. *United States*, 195 U. S. 27, 60; *Brushaber* v. *Union Pac. R. Co.*, *supra*, 24-25; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615; *Nichols* v. *Coolidge*, 274 U. S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States*, *supra*, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka*, 20 Wall. 655, 663-664; *McCray* v. *United States*, *supra*,

56-58, and authorities cited; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *Child Labor Tax Case, supra*, 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the ten per cent. tax imposed upon the notes of state banks involved in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. 'The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' Again, in the *McCray* case, *supra*, answering a like contention, this court said (p. 59) that the argument rested upon the proposition 'that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.' And it was held that if a tax be within the lawful power of the legislature, the exertion of the power may not be restrained because of the results to arise from its exercise.

* * * * * *

"If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a

> contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank* case, where it was urged that the tax was 'so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank'; in the *McCray* case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish* case, from which we have just quoted; and in the *Child Labor Tax Case*, where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden."

Again the same principle was reiterated in *United States* v. *Sanchez*, 340 U. S. 42, 44, where this Court said:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."

We think it is unnecessary to burden this Court with an analysis of the various authorities appellants have cited in Point II of their brief. We believe it sufficient to say that the federal decisions cited do not involve situations comparable to that presented by the case at bar and that the state decisions for the most part involved interpretations of state constitutions rather than the Federal Constitution. A number of decisions by the Supreme Court of Illinois are cited by appellants. It is obvious these authorities are meaningless in view of the last word of that court in this case (412 Ill. 321) and in *Bode et al.* v. *Barrett et al.*, 412

Ill. 204. To demonstrate the inapplicability of the authorities cited by appellants we wish to point out that the quotation from the *Ohio Tax Cases*, 232 U. S. 576, 589, set forth at page 47 of appellants' brief, leaves the impression that this Court in that case was discussing the Bill of Rights of the Federal Constitution. The fact is that the quoted portion of this Court's decision related to language used by the Ohio Supreme Court in interpreting the Ohio constitution rather than the Federal Constitution. The Court should also recognize that the parenthetical expression appearing in such quotation is the statement of appellants' counsel in this case rather than that of the Ohio court.

V.

The 1951 Act does not contain arbitrary, inconsistent, vague and uncertain classifications in violation of the Fourteenth Amendment.

In point III of their brief, pages 64 to 76, appellants argue that the 1951 Act contains numerous provisions so arbitrary, inconsistent, vague and uncertain as to amount to a violation of the Fourteenth Amendment. Altogether appellants point to nine different provisions of the Act which they assert are violative of the Constitution.

At the outset it should be noted that each of the nine contentions made in point III of appellants' brief was pleaded, briefed and argued at length in the case of *Bode et al.* v. *Barrett et al.*, 412 Ill. 204. Although the Illinois Supreme Court in its opinion in the *Bode* case did not specifically discuss each of the appellants' nine contentions, it is a fact that the same were considered and rejected by that court as follows (412 Ill. 204, 234):

> "Other questions are raised by plaintiffs and other contentions appear in the briefs of *amici curiae*. A

complete answer to most of them can be found in the authorities previously considered and principles of law emphasized in this opinion."

Likewise, each of the nine contentions made by appellants was raised, briefed, and argued in the proceedings in this cause before the Supreme Court of Illinois. Again, in its opinion in this case the Supreme Court of Illinois did not discuss individually each of these conditions but all were rejected by the court as fonows (412 Ill. 321, 331; R. 324):

> "We have given all questions raised on this appeal serious consideration, and we have reached the conclusion, in view of what we have said heretofore and our pronouncements in the recent opinion of *Bode* v. *Barrett* [412 Ill. 204] that the 1951 Amendment to the Motor Vehicle Act of Illinois is constitutional, and the decree of the trial court is reversed."

In addition, we call attention to the fact there is no claim by appellants and no evidence in the record to the effect that any of the appellants are directly or indirectly affected or injured by the nine provisions of the Act claimed to be vague and uncertain. The contentions of appellants in this portion of their brief amount to nothing more than conjecture, absent an actual application of the Act presenting a controversy. Not one of the appellants testified that in fact he was confused or misunderstood or had suffered any injury as a result of the administration of the assailed provisions of the Act. We submit that appellants have not shown they are within the class affected by any of the provisions of the Act claimed to be vague and indefinite and have not shown the existence of any justiciable issue with respect to such provisions. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Hicklin* v. *Coney*, 290 U. S. 169.

We will answer the contentions of appellants in the order raised in their brief and demonstrate that the same are without merit both factually and legally.

1. Commencing at page 69 of their brief appellants assert that subsections (h) and (i) of Section 9 of the Act are inconsistent, overlapping and arbitrary. Appellants contend that certain four-wheel vehicles are taxable under both subsections. Appellants disregard the ordinary rules of punctuation and grammar. For convenience we set out below the two subsections to which appellants refer:

> "(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.
>
> "(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00."

A reading of those two subsections shows that appellants are straining in vain to create confusion where none exists. Subsection (h) clearly comprises four wheel vehicles and vehicles having more than four wheels in the gross weight range from 20,000 to 24,000 pounds. Obviously the clause "• • •, and not more than twenty-four thousand (24,000) pounds, • • •" modifies both prior clauses of the subsection. This construction is required by all rules of grammar and punctuation. The quoted clause is set off by commas at each end but appellants ignore the first comma.

Also, such a construction harmonizes perfectly with subsection (i), since the latter clearly comprises "four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds."

Appellants particularly complain of the application of these two subsections to a four wheeled truck weighing in excess of 30,000 pounds; and at page 69 of their brief they state that such a vehicle would be taxable only under subsection (h). A reading of subsection (h) makes it clear that it does not apply to any vehicle weighing in excess of 24,000 pounds gross.

In any event it should be noted that the testimony of appellants' witnesses, Houska (R. 162-166) and Kennedy (R. 166-167), shows that no four wheeled vehicles weighing in excess of 30,000 pounds gross have ever been found to be operating on the Illinois highways except in a few cases, in all of which such vehicles were operating illegally in that the rear axle bore a gross weight of more than 18,000 pounds in violation of Section 228 (a), Chap. 95½, Ill. Rev. Stat. 1951. There is no testimony in the record in this case that any one desires or intends to operate on the Illinois highways a four wheeled vehicle weighing in excess of 30,000 pounds which does not exceed the above mentioned axle load limitation.

2. At page 70 of their brief appellants contend that subsections (i-3) and (i-4) of the Act are overlapping and inconsistent. Under fundamental principles of statutory construction and the maxim *expressio unius est exclusio alterius* (*I.C.R.R. Co.* v. *Franklin County*, 387 Ill. 301, 313) it is clear that vehicles having ten or more wheels are to be taxed under subsection (i-4) and not under subsection (i-3) of Section 9.

3. At pages 70 to 72 of their brief appellants complain that certain passenger carrying busses operating within municipalities or a close radius thereof and equipped with hydraulic shock absorbers and whose rates are subject to regulation by the Illinois Commerce Commission are af-

forded lower rates of taxation than are property carrying vehicles of the same weight and equipment. The leading authority sustaining separate classifications of trucks and passenger carrying busses is *Sproles* v. *Binford,* 286 U. S. 374. There a Texas act limited the net load of freight carrying vehicles to 7,000 pounds, but placed no limitation whatsoever upon the weight or net load of passenger carrying vehicles. The truck operators charged that this constituted an unconstitutional discrimination in favor of passenger carrying vehicles and against freight vehicles. This Court held the classification valid saying (p. 396):

> "But in passing upon the question of the constitutional power of the State to fashion its regulations for the use of the highways it maintains, we cannot ignore the fact that the State has a distinct public interest in the transportation of persons. We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of conveniences for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight. There is no constitutional requirement that regulation must reach every class to which it might be applied, —that the legislature must regulate all or none."

The separate classification of busses operating within municipalities or a close radius thereof is clearly proper. It is a fact of common knowledge that such busses pay municipal franchise taxes which are usually substantial in amount. The passenger fares charged on such busses are subject to regulation by the Illinois Commerce Commission

(Ill. Rev. Stat., 1951, Chap. 111⅔, Art. IV), and hence any taxes paid by operators of such busses must ultimately be borne by the riding public. Also the territory in which such busses may operate is confined by the operating authority obtained from the municipality and the Commerce Commission (Ill. Rev. Stat., 1951, Chap. 111⅔, Sec. 56; Ill. Com. Comm. Gen. Ord. No. 153 [June 18, 1940]). In view of the foregoing the legislature could reasonably have concluded that it was desirable to impose lower annual State license fees on such busses in order to afford a greater area for local taxation.

4. At page 73 of their brief appellants contend that the Act does not impose a tax on "Six or more wheeled vehicles under 30,000 pounds". A mere reading of the statute demonstrates the frivolity of appellants' contention. Obviously a six wheeled vehicle weighing from 24,000 to 30,000 pounds would be taxed under subsection (i); a six wheeled vehicle weighing from 20,000 to 24,000 pounds would be taxed under subsection (h); and a six wheeled vehicle weighing less than 20,000 pounds would be taxed under the preceding subsections.

5. At page 73 of their brief appellants complain that there is no provision in the Act permitting the registration and taxation of a tractor only. Appellants are here referring to the type of tractors used to pull other vehicles such as semi-trailers. It is true that the Act does not provide a tax for a tractor alone. We submit, however, there is nothing unreasonable in requiring the owner of a tractor designed to pull a semi-trailer to pay a registration fee for the combined weight of the tractor and semi-trailer since the only function of the tractor is to pull a semi-trailer. In part appellants' complaint is that since no separate tax is provided for a tractor alone such vehicles are unduly favored in that they are permitted to use the Illinois high-

ways tax free. Such, of course, is not the fact for a tractor must be registered and a tax paid with respect to it in combination with a semi-trailer.

6. At page 73 of their brief appellants complain that the terms "gross weight" and "maximum load" used in Section 9 of the Act are vague, uncertain and incapable of understanding without the assignment of an arbitrary definition. That this contention is without foundation is demonstrated by the opinion of the Supreme Court of Illinois in *Bode* v. *Barrett*, 412 Ill. 204, where that court said (page 230):

> "Plaintiffs also contend that the act, by failing to define gross weight of maximum load, is unconstitutional because of being vague, indefinite and a delegation of legislative authority. This precise language has been continuously in section 9 of the act without change since its original enactment. The evidence shows that the meaning of this phrase has been well understood and has had a continuity of legislative and administrative interpretation of thirty-two years and that the same has caused no confusion, and no one in the case testified as to the existence of any confusion or misunderstanding in respect thereto. The owner in applying for registration states under oath, in his application, the weight of his vehicle, the maximum load and the sum of the two, being the gross weight. The term maximum load has been consistently interpreted as the maximum load the owner intends to carry during the registration period. The Motor Vehicle Law prohibits the use of the highways by a vehicle the gross weight of which exceeds that stated in the application blank and the evidence carried on the plates on the vehicle. Such language is clear and definite and does not delegate any legislative authority to the Secretary of State."

This construction of the statute by the Supreme Court of Illinois disposes of appellants' contention of uncertainty. *Hicklin* v. *Coney*, 290 U. S. 169, 172; *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613.

7. At page 74 of their brief appellants assert that the phrase "like exemption and privileges" appearing in Section 20 of the Act is vague, uncertain and incapable of clear understanding.

We think extended argument is unnecessary to show that the phrase in question is entirely clear and certain and appellants do not point out wherein the phrase is vague or indefinite. It is obvious that the legislature in adopting Section 20 intended to extend reciprocity to nonresidents of Illinois to the extent that other states granted Illinois residents tax-free use of their highways. It is difficult to comprehend wherein uncertainty or speculation could arise from such a provision. All that is required is the measurement of the motor vehicle tax provisions of another state's laws against the provisions of the Illinois law.

8. At page 75 of their brief appellants assert the contention that the phrase "a close radius thereof" is indefinite and uncertain. With reference to this phrase the Supreme Court of Illinois, in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, stated at page 230:

> "Thus the phrase 'or a close radius thereof' expresses a well-recognized, ascertainable, unambiguous concept."

This finding of the Supreme Court of Illinois is final and controlling and presents no federal question for review by this Court. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 613; *Hicklin* v. *Coney*, 290 U. S. 169, 172.

9. Commencing at page 75 of their brief appellants urge that the phrase "agricultural pursuits" appearing in Section 9 of the Act is vague, indefinite and uncertain. As stated by the Supreme Court of Illinois in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 234, the appellants' contention is "not well taken in view of the long line of decisions consist-

ently holding valid, both under State and Federal constitutions, such provisions similar to those under consideration." Appellants' conjecture as to future action of the Secretary of State of Illinois raises no issue requiring consideration by this Court. As this Court has indicated on many occasions, it will not anticipate that the action of a state official in administering state laws will be arbitrary and capricious so as to invalidate constitutional rights, and that the court is not called upon to decide such an issue until factually an actual case of alleged unconstitutional and arbitrary action is presented. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 369; *Hicklin* v. *Coney*, 290 U. S. 169, 172-3.

Conclusion.

For the reasons contained in the argument above it is respectfully submitted that the final judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of
State of Illinois,
160 North LaSalle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant
Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant
Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant
Attorney General,
135 South La Salle Street,
Chicago, Illinois;

Attorneys for Appellees.

APPENDIX I.

In this appendix we set forth three tables (Table A, Table B and Table C) in which the Illinois tax is compared with taxes in Oregon and North Dakota. The principal factor in the total amount of the Oregon taxes is a weight-mile tax, based on the gross weight of the vehicle and the miles traveled. Reciprocity with respect to this weight-mile tax is not granted. Hence truckers from other states must pay this tax in Oregon, and Oregon truckers must pay taxes in other states in which they operate. The North Dakota tax is on a flat annual basis. North Dakota grants reciprocity as does Illinois.

North Dakota and Oregon were used for comparative purposes because their statutes impose taxes framed in such form as to facilitate comparison with Illinois taxes. There is such a wide variety of bases of motor truck taxation that comparison of Illinois taxes with those of many states would require involved assumptions and computations and the use of numerous factors not of record. The tables herein are based on facts of record and easily understood statutes.

The statutes of Oregon and North Dakota on which the tables are based are the following:

Oregon: Laws of 1951, Chapters 410 and 428. Chapter 410 requires an annual registration tax of $0.70 per hundred-eight of unladen weight. The following tables assume that the unladen weight is one-third of the gross weight. We believe this to be an ultra conservative estimate. Chapter 428 provides for the weight-mile tax.

North Dakota: Laws of 1951, Chapters 244 and 246, require annual taxes based on gross weight of vehicle and load. Sections 49-1832 and 49-1841, Rev. Code, 1943, require annual fees of $30 per vehicle from carriers for hire.

Table A and B use data taken from the evidence relating to Cecil Kain (R. 69) and Koehler Transfer (R. 77). These tables compare the taxes which will be paid by these parties in Illinois in 1952-53 and 1954 with the

taxes they would have to pay to conduct the same operations in 1952 in Oregon and North Dakota.

Oregon has a six cents per gallon gasoline tax, whereas the Illinois tax (four cents in 1952) will be five cents in 1953 and 1954. The North Dakota tax is five cents. Therefore to compare with complete accuracy present Oregon taxes with Illinois taxes required to be paid in 1953 and 1954 would necessitate adding to total Oregon taxes one cent of gasoline tax for each 4.3 miles of travel (R. 307, Col. (7); offered at R. 195). However, in the interest of simplicity we have not added this factor to the Oregon taxes shown in the tables.

Kain testified that he had one tractor registered for 59,000 pounds gross weight for which he would pay in license taxes under the 1951 Act $894 in 1952 and 1953, and $1250 in 1954. His mileage totaled 53,000 (R. 69-70). On that basis his taxes in Oregon and North Dakota would compare with Illinois taxes as follows:

Table A.

Illinois			
1952-53	1954	Oregon	North Dakota
$894	$1250	$1940	$1130

It will be observed that Kain's taxes would be $236 per year higher in North Dakota in 1952 and in 1953 than in Illinois, and $120 less in North Dakota in 1954. His taxes in Oregon would be more than twice the Illinois taxes in 1952 and 1953, and $690 more than the Illinois taxes in 1954.

Witness Koehler of appellant Koehler Transfer testified that they have three trucks, two licensed for 41,000 pounds and one for 55,000 pounds gross weight; that their Illinois licenses in 1952 and 1953 will cost $2184 and in 1954 will cost $3050; and that their total mileage in Illinois in 1951 was 125,000 miles (R. 77-78). He did not divide the mileage among the trucks, and for the purpose of the following comparison we have divided it equally among the three, resulting in 41,666 miles per annum per vehicle.

Table B.

Illinois Taxes 1952-53	Illinois Taxes 1954	Oregon Taxes	North Dakota Taxes
$2184	$3050	$3214	$2080

In Table C following, column (1) sets out the weight brackets in subsections (a) to (i-4) of the 1951 Act, and column (2) is derived from column (4) of defendants' Exhibit 7, (R. 307; offered at R. 195). The Oregon taxes shown in column (5) are the amounts that would be required for operating in Oregon vehicles of the gross weights and mileages shown. It will be noted that the present Oregon taxes exceed by substantial amounts all categories of the Illinois taxes for 1952 and 1953, exceed the Illinois taxes for 1954 in eight brackets, and closely approach them in seven brackets.

Table C.

Weight of Vehicle (pounds)	Average Mileage per Year	Illinois Tax 1952 1953	1954	Oregon Tax
(1)	(2)	(3)	(4)	(5)
3,000 & less....	7,500	$ 10.	$ 10.	$ 21.
3,001 to 8,000..	10,000	20.	26.	41.
8,001 to 10,000..	12,500	46.	63.	66.
10,001 to 12,000..	16,000	67.	92.	100.
12,001 to 14,000..	18,500	86.	119.	123.
14,001 to 16,000..	20,500	106.	146.	152.
16,001 to 20,000..	23,500	159.	221.	187.
20,001 to 24,000..	28,000	256.	357.	350.
24,001 to 30,000..	36,500	425.	593.	562.
30,001 to 36,000..	36,500	584.	815.	686.
36,001 to 41,000..	36,500	640.	895.	844.
41,001 to 45,000..	36,500	705.	985.	962.
45,001 to 50,000..	36,500	789.	1,103.	1,073.
50,001 and over.. (8 wheel)	36,500	894.	1,250.	1,379.
50,001 to 72,000.. (10 wheel) ...	36,500	1,139.	1,593.	1,737.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 5 1953

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Appeal From The Supreme Court of the State of Illinois.

REPLY BRIEF FOR CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HIPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street.
Aurora, Illinois.
REID AND OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

INDEX TO THE SUBJECT MATTER.

		PAGE
I.	Appellants have standing to challenge the 1951 Act under Section 8, Article I and other provisions of the Constitution of the United States	1
II.	The 1951 amendment imposes an undue burden on interstate commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States	7
	A. The tax bears no reasonable relation to the privilege of using the highways of the State of Illinois	7
	B. The tax is excessive in amount	12
III.	The taxes imposed by the 1951 amendment are confiscatory and violate the 14th amendment to the Constitution of the United States	14
IV.	The 1951 amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of the United States	21

TABLE OF CASES.

Bode, et al. v. Barrett, et al., 412 Ill. 204 ..... 17, 21, 25

Clark v. Paul Gray, Inc. 306 U.S. 583 4

Freeman v. Hewitt, 329 U.S. 249 5

Hendrick v. Maryland, 235 U.S. 610 4

Hicklin v. Coney, 290 U.S. 169 ..... 21, 22

PAGE

Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 21

M. K. & T. Ry. Co. v. Cade, 233 U.S. 642 4

Magnano v. Hamilton, 292 U.S. 40 18

Massachusetts v. Mellon, 262 U.S. 447 4

McCray v. U.S., 195 U.S. 27 18

Miles v. Department of Treasury, 209 Ind. 172; 199 N.E. 372 (Appeal dismissed, 298 U.S. 640) 4

Puget Sound Stevedoring Co. v. Tax Commission of State of Washington, 302 U.S. 90 4

Southern Ry. Co. v. King, 217 U.S. 524 4

State v. Lucas, 196 La. 299, 199 So. 126 17

U. S. v. Sanchez, 340 U.S. 42 18

CONSTITUTION OF THE UNITED STATES.

Section 8 of Article I 1, 3, 7

Section 1 of Amendment 14 ..... 7, 14, 18, 20, 21, 26

STATUTES.

Ill. Rev. Stats. 1951, Ch. 95½, Sec. 50 9

Smith Ill. Rev. Stats. 1921, Ch. 121, Sec. 208 12

Sub-section 2 of Section 1257 of Title 28 of the U.S. Code 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Appeal From The Supreme Court of the State of Illinois.

REPLY BRIEF FOR CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS.

ARGUMENT.

I.

Appellants have standing to challenge the 1951 Act under Section 8 of Article I and other provisions of the Constitution of the United States.

Appellees contend that appellants have no standing in this Court to challenge the 1951 Act under Section 8 of Article I of the Constitution of the United States in Point I of their argument (appellees' brief, p. 11-14).

This court has already noted probable jurisdiction of the cause in an order entered on October 13, 1952 (R. 336) over the same objections to jurisdiction urged by appellees in their brief under Point I.

Jurisdiction was and is invoked under sub-section 2 of Section 1257 of Title 28 of the U. S. Code.

Appellees in effect admit that this court has jurisdiction when they confine their objections to the Commerce Clause. Appellees do not question that this court has jurisdiction to decide whether the 1951 Act is repugnant to the Equal Protection and Due Process Clauses of the Constitution.

The appellants' vital connection with interstate commerce is clearly evident from the record.

Some appellants cross state lines themselves. For example, Co-ordinated Transport transports freight in interstate commerce in Wisconsin, Illinois, Indiana, and Ohio (R. 37-39); Wagner Transfer does seventy-five per cent (75%) of its work between States (R. 53); Alton Box Board operated one million miles outside of Illinois in 1951 (R. 61); appellant Young's leased trucks in that same year operated only 200,000 miles within Illinois and 2,300,000 miles outside the State (R. 66-7).

Other appellants participate in interstate commerce no less directly. Even carriers such as appellant Kain and appellant Ryan are integral parts of interstate commerce; Kain travelled but 2000 of a total of 55,000 miles outside of Illinois (R. 70), but leased his equipment to an interstate carrier with offices outside Illinois in Iowa (R. 69). Ryan is a connecting carrier connecting with interstate operators and sharing in a rate set by the Interstate Commerce Commission, although Ryan's entire mileage was in Illinois (R. 76).

Appellant Haen operates in an interstate exchange of trailers (R. 71); Gold Star Motor Service (Church) is a connecting carrier in interstate commerce (R. 86), and appellant Valentine not only is a terminating carrier in interstate commerce, but does cross country hauling in all 48 states through a lease arrangement with Allied Van Lines (R. 96).

Koehler operates 1,000 miles yearly outside Illinois carrying farm products (R. 78). Elgin Transfer and Storage, although actually operating only 2,500 miles outside Illinois, does 70% of its total mileage of about 824,000 miles in interstate commerce by acting as a terminating and originating short haul carrier connecting with interstate line haul carriers (R. 83, 84). Dumont Cartage operated 8,000 of 571,000 miles outside of Illinois but does 75% of its business in interstate commerce in the same manner as Elgin Transfer and Storage (R. 89, 90). Of all the appellants Field alone operates exclusively in intrastate commerce (R. 81).

These facts in evidence in support of the averments in the complaint that appellants were engaged in interstate commerce clearly bring appellants within that class of persons as to whom the act is unconstitutional as a violation of Art. 1, Sec. 8 of the Constitution of the United States. All types of carriers, engaging in diverse operations with varied equipment and capital engaged in interstate commerce, are before the Court.

Because plaintiffs are engaged in interstate commerce they are directly and personally injured by the burden on that commerce imposed by the 1951 Act.

The cases cited by appellees (appellees' brief, P. 13), are not in point with the case at bar. Here appellants' connection with interstate commerce and the resulting

burden of the 1951 Act on interstate commerce were both pleaded and proved. In *Southern Ry. Co.* v. *King,* 217 U.S. 524, 534, the burden of the Georgia statute on interstate commerce, this court held, was not even properly pleaded let alone proved. In *M. K. & T. Ry. Co.* v. *Cade,* 233 U.S. 642, 648, the judgment appealed from was clearly not based on a claim arising out of interstate commerce. *Massachusetts* v. *Mellon,* 262 U.S. 447, 488, involved the validity of the Maternity Act and the Commerce Clause was not mentioned in the opinion. *Hendrick* v. *Maryland,* 235 U.S. 610, 621, was decided upon its merits and *Clark* v. *Paul Gray, Inc.,* 306 U.S. 583, 595-6, involved federal jurisdiction based upon the jurisdictional amount of $3,000.00 and not upon interstate commerce.

Appellees' position is that appellants, despite their obvious participation in and intimate connection with interstate commerce, have no right to complain of the burden on interstate commerce because all the appellants are either residents of Illinois, Illinois corporations or foreign corporations licensed to do business in Illinois with places of business in this state and thus are taxed on a parity with other Illinois operators. This contention hardly merits answer in view of the facts of the case and the numerous decisions of this Court holding that it is the interstate commerce which is protected. See: *Puget Sound Stevedoring Co.* v. *Tax Commission of State of Washington,* 302 U.S. 90.

The place of residence or business of the person conducting such commerce is not controlling. In this connection the appellees' contention that *Miles* v. *Department of Treasury,* 209 Ind. 172; 199 N.E. 372 (appeal dismissed, 298 U.S. 604) is directly in point, may be easily

answered by *Freeman* v. *Hewitt*, 329 U.S. 249, reh. den. 329 U.S. 832. In the *Miles* case the burden of the Indiana Gross Income Tax Act of 1933 on interstate commerce was not discussed by the Supreme Court of Indiana when the appellants, as tax-payers, sought to enjoin payment of state funds for the printing of blanks. Later however, in the *Freeman* case involving the same tax involved in the *Miles* case this court accepted an appeal under then Sec. 237(a) of the Judicial Code, 28 U.S.C.A. 344(a) which is now 28 U.S.C.A. Sec. 1257, *exactly the same statutory provision under which jurisdiction is invoked in this case.* In the *Freeman* case the tax-payer was domiciled in Indiana. The securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the contention that because Indiana transactions were likewise taxed at the same rate as interstate transactions the tax was in all respects proper, this Court stated at page 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while

> the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things."

The Freeman case is a complete answer to the appellees' contention that because the appellants are engaged in intrastate operations they are therefore in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

Appellees also contend that there is no proof that additional taxes were paid to any other state for the privilege of using highways in interstate commerce by virtue of the reciprocity provisions in the 1951 Act. Aside from the fact that appellant Kain testified that he was obliged to pay additional fees in Iowa (R. 70) in addition to his Illinois taxes, this court in the Freeman case in disposing of a similar contention stated (P. 256-257):

> "But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. . . . Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because

of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce."

We submit that the record establishes and the principles of law above cited confirm that appellants are entitled to challenge the 1951 Act.

II.

The 1951 Amendment imposes an undue burden on Interstate Commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States.

A.

The tax bears no reasonable relation to the privilege of using the highways of the State of Illinois.

In their brief, appellees criticized our treatment of the Brice case contending that we have taken an inconsistent position. We believe that it will be apparent to the court that what we have done is to consider the matter in the alternative. It is our position that the Brice case does not stand for the proposition that whether or not a tax is constitutional must be judged solely by its result and not its formula. It is our position that the formula must be examined to see if the fees imposed relate to the privilege granted. If the formula bears no reasonable relationship to the privilege then the tax in invalid. However, we also take the alternative position that if the result bears no relationship to the value of the privilege regardless of the formula used, then of course, the tax is invalid.

The court should keep in mind that the study made by the Illinois Department of Public Works and Buildings and referred to on P. 16 of appellees' brief was based

upon the Griffenhagen report, which as we pointed out to the court in appellants' brief, was a report made by Griffenhagen and Associates, a group of engineers which had been hired by the Illinois Division of Highways for the very purpose of studying the highway system in Illinois and recommending a schedule of motor vehicle taxes. Mr. Barker, the Chief Highway Engineer, thought that the report was sound. He approved the report. He aided in the preparation of the report. Yet the legislature completely disregarded the tax schedule recommended by Griffenhagen and enacted a schedule which was approximately double that recommended by Griffenhagen.

Throughout their brief the appellees used the word "equalized" as though it were a magic touch-stone. The court should keep in mind that the only equalization that was done in this tax schedule was to increase all of the truck taxes with one exception while the tax on passenger cars was left untouched. This was done despite the fact as revealed in the evidence of the Chief Highway Engineer that many highway improvements are necessary because of the millions of passenger car automobiles, and the high speed at which they travel, and many other factors having no relationship to the heavy vehicles. The truck taxes were increased as high as possible to raise the most money possible without increasing the passenger car taxes. The basic assumption of the schedule was that the existing passenger car tax was correct, although there was no evidence to support this assumption. It is clear that the sole idea was to raise truck fees and not to distribute the cost of the improvements in accordance with the benefits received. As it appears from the schedule on page 18 of the appellees' brief, those trucks weighing 3,000 pounds and less should have been charged a tax of $1.62 per year, and yet they were taxed $5.00 as they had

been prior to 1951. If it had been the intention of the legislature to charge in accordance with the benefits received, even under their own theory, the tax for this group of trucks should have been reduced accordingly.

The appellees state on page 17 of their brief that the proceeds of the motor vehicle license taxes and motor fuel taxes are used exclusively for highway purposes. This is not strictly accurate, as the legislature has authorized the use of the fund for the construction of flight strips as well as for highway purposes. (Ill. 1951 Rev. Stats. Chap. 95½ Sect. 50).

The statements appearing on page 19 of the appellees' brief point out the necessity for a sound formula which relates the tax to the benefit received. The State Highway Department presented an estimate of need for the period of 1951—1960 of over one billion dollars. It could just as easily have made it ten billion dollars and there is no one who could say that the State Highway Department did not have plans which called for the expenditure of this amount of money, or that the expenditure of this amount of money was not necessary or desirable, and if the only test to be applied is whether or not the tax would exceed the amount of money claimed to be needed for highway purposes, then no such tax could ever be held invalid.

Professor Worley's testimony is attacked. At the outset, it should be kept in mind that we are not contending that Professor Worley's schedule of fees should be adopted nor are we contending that his is the only possible schedule. We stated this in our brief, but we feel it is necessary to state it again because the appellees have either failed to understand or have chosen to ignore our statements in this regard. Worley's testimony was offered

to demonstrate how the state's formula was misapplied, and as a competent yardstick for the court to use in determining whether the result was proper and bore relation to the value of the privilege granted. Worley's allocation of construction and maintenance costs on a percentage basis between factors due to weight and factors not due to weight was not arbitrary. A reference to page 32 of our brief shows that the Division of Highways of the State of Illinois spent in 1949 approximately 66% of the money spent for maintenance on items that were not related in any way to the weight of the vehicle passing over the highway, and this is the same percentage figure that was used by Professor Worley in allocating maintenance costs between items due to weight and those not due to weight.

Appellees do not give an accurate summary of Worley's testimony. Appellees state that Worley testified that whether the allocation of construction costs as between items due to weight and items not due to weight is the generally accepted view among highway engineers, was not known to him. Appellees would have the court believe that this theory of allocation is solely Worley's theory. This is not a correct resume of his testimony and if the court would read his testimony it will be seen that what Professor Worley said was that the amount of the allocation was often the subject of a difference of opinion, but it will be noted that he testified that *every highway engineer would recognize that certain costs incurred in the construction and maintenance of highways are in no way related to weight* and that it is always proper to make an allocation between those items which are not due to weight and the items which are due to weight. He said there would be no difference of opinion amongst qualified engineers as to the fact that the costs are distributed but there might be some difference of

opinion as to what the percentages should be. In support of this contention he cited Mr. Joseph Eastman, the United States Board of Investigation and Research, Bader and Downs, and the Griffenhagen report. Even the Chief Highway Engineer of the State of Illinois admitted that this theory of allocation was sound but stated that he made no effort to apply it because he thought it was impossible to determine the percentages of items due to weight and items not due to weight. He testified on page 193 of the record that the Griffenhagen report stated that traffic density may have more influence in some instances than weight; that passenger vehicles themselves may contribute to cost increments for such factors as speed, safety and convenience; highway construction and maintenance are influenced by such factors as weather, which have nothing to do with vehicle characteristics; costly highways have not been built solely to meet the requirements of heavy vehicles; and a large part of maintenance costs is independent of traffic. Despite his recognition of the soundness of the principle of allocation, Barker chose to ignore it altogether. He failed even to make a "rough approximation" which would have satisfied the legal requirements.

But it should be kept constantly in mind that we are not contending that Professor Worley's schedule should be adopted, and it should be kept in mind that his testimony was for the purpose of showing the fundamental fallacy in the tax schedule prepared by the state. We are not contending for scientific precision, but when the result shows that a schedule has been adopted which is as much as 300% excessive in certain classifications and which is approximately twice the amount of the tax recommended by the experts hired by the highway department to study the problem, it shows that the legislature has made no effort to correlate the tax to the benefits received.

Again, we are not objecting to a tax based on the ton-mile theory but we are objecting to the way in which the ton-mile theory was used in this case. When the evidence is clear that certain highway costs are not related to weight, and when the evidence is clear that the tax schedule is based solely on weight, then we earnestly contend that the formula has been misapplied and the resultant tax bears no relation to the value of the privilege of using the highway and is unconstitutional.

B.

The tax is excessive in amount.

Appellees make much of the fact that over the last thirty-five years costs of construction and maintenance of highways have tremendously increased. They fail to call the court's attention to the fact that the registration of motor vehicles in the State of Illinois has tremendously increased also during the past thirty-five years. The revenue has increased along with the increase in cost. Whether or not the motor vehicles of the State paid their fair share in tax heretofore is not the question before the court today, but the question to be determined is whether or not the present tax is excessive. Appellees state that we should not retain fees that are applicable to the "horse and buggy" days. It is extremely interesting to examine the taxes contained in the statutes of the State of Illinois which were in force in 1919 when the motor vehicle law was first passed, and the taxes contained in the present act with reference to passenger automobiles. That comparison follows:

Vehicle	1919 Fee	1952 Fee
Motor Vehicle—24 H.P. and less	$ 8.00	$ 6.50
Motor Vehicle—25-35 H.P.	12.00	10.50
Motor Vehicle—35-50 H.P.	20.00	17.00
Motor Vehicle—over 50 H.P.	25.00	22.00

The taxes for passenger cars are lower than they were in 1919.

When it is realized that even the state admits that many highway costs are necessary because of the great number and the high speed of the passenger car, it becomes readily apparent why the owners of trucks have justifiable cause for complaint.

Appellees state that the taxes previously approved by this court were involved in cases decided as early as 1915. While this is correct it should be kept in mind that the *Brice* case was decided in 1950 and the appendix thereto lists all of the cases that had previously been decided by the court up until that time. This tax is twenty times the size of any tax based on weight that has her tofore been sustained by this court.

Appellees add to their brief an appendix wherein they point out that under certain circumstances and with relation to certain truckers, two other states charge fees comparable to the Illinois fees. They discuss the said comparison at page 32 of appellees' brief. Of course, the Oregon tax is based on mileage actually travelled and hence is completely unlike the Illinois tax. Moreover, neither of the cited statutes has been tested in this court. Although such taxes might be justified under the peculiar circumstances in the states involved, in the absence of court approval they certainly do not prove the Illinois Act is not excessive.

Whether any of the appellants intend to register vehicles in the class of fifty thousand to seventy-two thousand pounds is immaterial. If the class is provided for in the schedule, then its legality must be determined. A reference to page 62 of the record shows that the Alton Box Board Company is operating trucks weighing fifty-six

thousand pounds. The question is not whether the state could prohibit the operation of a truck of this weight on its highways but as to whether or not the state has imposed a tax which is in excess of the privilege granted by the state for the use of the highway.

On page 36 of their brief appellees contend that even if this court were to hold unconstitutional the 1951 Act as applied to interstate operations, never-the-less each of the appellants would be required to pay the full amount of the tax because of the extensive intrastate operations which each may conduct. As shown under Part I of this reply brief the interstate activities of the appellants are so interwoven with their intrastate activities that it would be impossible for this act to be enforced against them at all in the event that it would be declared unconstitutional by this court. Gerald Adams of t Elgin Transfer and Storage Company testified that his company picks up numerous loads of goods in Chicago and transports them to Elgin. Many of the goods are flowing in interstate commerce. Some of the goods are only delivered from Chicago to Elgin, Illinois. How could anyone determine what part of the operation was intrastate and what part was interstate? However, regardless of how it might affect the operations of appellants, the only issue before this court is whether or not the Act violates the provisions of the Federal Constitution. We contend that it does, and that the Act should be declared unconstitutional.

III.

The taxes imposed by the 1951 Act are confiscatory and violate the 14th Amendment to the Constitution of the United States.

In Point IV of the appellees' brief, pages 37 to 44, an attempt is made to answer point II of appellants' brief.

Actually, appellees choose to ignore the basic theory of our argument, namely: that the amount of a fee or tax for revenue puposes is within the discretion of the legislature subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. This proposition of law has been asserted and repeated by this Court and by the courts of the several states time and time again as demonstrated in our original brief.

The gist of appellees' argument seems to be that the record fails to demonstrate confiscation of any trucker or of the industry by the Act. For example, at page 37 of their brief appellees state:

> "Not one of these witnesses testified that the increased taxes provided by the 1951 Act would force his concern to go out of business."

Actually, of course, as we have demonstrated, such testimony could not have been introduced into this record since a witness would not be competent to so conclude. However, we again point out that each of the witnesses testified as to the tax which he had previously paid, as to the tax which he will be obliged to pay under the new Act, as to his net profits in 1950 and his estimated net profits for 1951, as to his capital invested in his business and as to his inability to pass on these increases in taxes to his customers. This testimony demonstrated clearly that each witness' net profits would either be wiped out entirely by the operation of the 1951 amendment to the Motor Vehicle Act, or would be cut so drastically that the witness would not be able to make a fair return on the capital invested in his business, and that these tax payments could not be passed on in the form of higher rates to the customers who were using the witness' services. Not one shred of evidence was introduced by the appellees to contradict this

testimony. The fact of confiscation is clearly demonstrated by the record in the case at bar. Appellees were unable to produce so much as one witness engaged in the trucking industry able to testify either that his profits were sufficient to absorb the increased tax or to indicate that the tax increase could be passed on to his customers in the form of higher rates. Again we observe that this testimony is clear, conclusive and uncontradicted.

Moreover, appellees complain that only fourteen of the appellants testified at the trial in this cause, and indicate that these were a few hand picked marginal operators. True, only fourteen of the appellants testified. At the outset of the case we indicated that we intended to introduce some thirty-five or forty truckers (R. 40). However, after some two days of such testimony Mr. Chadwell stated:

> "I want to state further, if the Court please, that it seems to me that to go on with witnesses of this type serves no useful purpose in this case . . .".

Whereupon, the Court responded:

> " . . . it does seem to me that we have had a lot of it—now I don't know how much you—" (R. 91).

The abstract of record was prepared by the appellees, and perhaps they have managed to raise the implication that this colloquy had to do with something other than the amount of this type of testimony. The fact is, however, that both Mr. Chadwell and the Trial Judge were at the time in question discussing solely the amount of testimony which seemed to be and was in fact repetitious and cumulative. The repetition and cumulation of such testimony is certainly the only way that confiscation of an industry or a substantial segment thereof can be proven by competent evidence. We continued to introduce more of such testimony until a cross-section of the trucking in-

dustry had been heard. True, the record does not include all truckers who do business in Illinois, but the record does include, as we have demonstrated, both intrastate and interstate truckers, local truckers, short haul and long haul carriers, truck brokers, contract carriers, private carriers, carriers who range in size from the owner of one power unit up to the operator of fifty-nine power units; carriers who carry all types of merchandise as common carriers, and others who specialize in various types of merchandise. They range from having been in the trucking business since 1911 up to an operator who commenced in the business in April of 1951. Again we submit that the appellants who testified in this record constitute a complete and comprehensive cross-section of the trucking industry in the State of Illinois, and the fact is that confiscation was demonstrated to the satisfaction of the Trial Court.

As we pointed out in appellants' brief, page 55, in the case of *State* v. *Lucas*, 196 La. 299, 199 So. 126, the fact of confiscation was demonstrated by the testimony of one affected business man. Here fourteen testified and fifty-four joined in the litigation as parties plaintiff, and still others joined in the case of *Bode* v. *Barrett*, which is now before this Court as Docket No. 187. Despite all of this testimony, appellees have the effrontery or naivety to state at pages 38 and 39 of their brief:

> "We submit there is not a scintilla of evidence in the record in this case that any trucking concern will go out of business because of the taxes imposed by the 1951 Act. Neither is there any evidence that the effect of the tax will be prohibitory or confiscatory as to the trucking industry generally."

We submit that the fact of confiscation of the trucking industry, or of a large segment thereof, has been conclusively demonstrated, and there is not in the record a

scintilla of evidence to the contrary, and that, in view of the uncontradicted authority contained in appellants' brief that a legislature may not confiscate a legitimate and useful industry by excessive taxation, the 1951 amendment to the Illinois Motor Vehicle Act violates Section 1 of the 14th Amendment to the Constitution of the United States and is unconstitutional.

Appellees, at page 40 of their brief, indicate that we had expressed some doubt as to whether the 1951 Act is regulatory or a tax for revenue purposes. Actually, of course, we were never in doubt, but we did demonstrate in the alternative that whichever type of measure the 1951 Act is, it is invalid, and, moreover, that the basic theory adopted by the Illinois Court in some of its decisions relative to regulatory measures coincides almost exactly with the theories adopted by other Courts in holding excessive revenue measures unconstitutional.

The only other contention relative to the confiscation point made by the appellees is the amazing theory propounded "that where the legislature has the power to lay a tax as a revenue measure there is no constitutional limitation upon the amount of the tax that may be imposed." (appellees' brief p. 40). Ignoring the many cases which we cited in our original brief to the effect that the legislature is limited by the due process clause of the 14th amendment, appellees seek to establish their proposition by citing three cases, namely: *McCray* v. *U. S.*, 195 U.S. 27; *Magnano* v. *Hamilton*, 292 U.S. 40; *United States* v. *Sanchez*, 340 U.S. 42. The *McCray* case and the *Magnano* case both dealt with excise taxes on oleomargarine, and the *Sanchez* case dealt with the validity of the Marihuana Tax Act. The authorities which we cited in appellants' brief have conclusively indicated that where a legislature might prohibit a business under the police power in pro-

tecting the general welfare, health, safety or morals of the public, then it might prohibit that industry by an excessive tax. Conversely, where a business is legitimate, useful and harmless, the right to engage therein is a property and a liberty and part of a man's "right to live and enjoy his life," for the protection of which the due process clause of the 14th amendment was designed.

Both the *McCray* case and the *Magnano* case, dealing as they do with a butter substitute and the right to foist that substitute on the public as butter, deal with an industry that can be prohibited under the police power. Indeed, this Court, in the *McCray* case, said at page 63:

> "This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this Court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction."

So, too, in the portion of the *Magnano* opinion which appellees quoted at page 41 of their brief, it is stated:

> "That clause (the due process clause of the 5th amendment) is applicable to a taxing statute such as the one here assailed only if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." (Parentheses Ours.)

Thus it can be readily seen that where, as here, a legitimate, useful, harmless, and, indeed, necessary occupation is confiscated, the reasoning behind the *McCray* case and the *Magnano* case is not applicable. So, too, the *Sanchez* case, dealing with a tax on marihuana, is a classic example of a situation where a reprehensible and harmful business, which should be destroyed and which may be destroyed under the police power, can, in fact, be destroyed by taxation validly and constitutionally. None of these cases demonstrate to the slightest degree that the trucking industry, which is vital to our economy, may be thus destroyed by excessive taxation. Appellees have nowhere contended that the trucking industry could or should be destroyed in the interests of public welfare, safety, health or morals. In the absence in this record of evidence that the trucking industry is in any manner harmful to the public, the cases cited by appellees serve only to strengthen the contentions which we made in the appellants' brief. The cases which we cite show beyond doubt that a useful and legitimate business may not be destroyed by excessive taxation. The cases cited by appellees simply reiterate this point in the converse, to wit: a harmful and deceitful business which can be prohibited under the police power may be prohibited by excessive taxation.

Therefore, we submit that the uncontroverted evidence of confiscation and the uncontroverted law as set forth under Point II of appellants' brief is controlling in the case at bar, and that the 1951 amendment to the Illinois Motor Vehicle Law in imposing taxes so excessive as to confiscate all or a substantial segment of the trucking industry in Illinois violates the 14th Amendment to the Constitution of the United States and is unconstitutional.

IV.

The 1951 Amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of the United States.

In Point V of their brief, pages 44-52, appellees attempt to explain away the terms and classifications in the 1951 Act which we contend are so arbitrary, inconsistent, vague and uncertain as to violate the Equal Protection Clause of the Federal Constitution.

In this attempt, appellees rely largely on the opinion of the Illinois Supreme Court in the case of *Bode et al* v. *Barrett et al.*, 412 Ill. 204. It hardly need be said that it is that decision and the decision of the Illinois Court in the instant case which this Court is asked to reverse because of error in this case and in *Bode et al.* v. *Barrett et al.*, Docket 187. Certainly the United States Supreme Court is the final authority in interpreting the provisions of the United States Constitution including the Equal Protection Clause, and no state court of last resort can foreclose this Court's passing upon alleged violations of the Federal Constitution.

We do not quarrel with the principle that the decision of the highest court of a state is controlling as to the meaning and effect of its state constitution (*Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 613) or as to the construction to be placed on a statute of that state (*Hicklin* v. *Coney*, 290 U.S. 169, 172), but there is no basis for the position taken by appellees that this court may not examine a statute for indefiniteness or uncertainty (*Hicklin* v. *Coney*, 290 U.S. 169, 172).

In Paragraph 6, Page 50 of appellees' brief, they contend that the terms "gross weight" and "maximum load"

are not uncertain in view of the fact that the Illinois Supreme Court has held that such terms are definite and do not violate the Equal Protection Clause. Similarly in Paragraph 8, Page 51 of their brief, appellees make the brief assertion that the finding of the Supreme Court of Illinois that the phrase "a close radius thereof" is not indefinite and uncertain is a final and controlling finding which this court may not review. In the case of *Hicklin* v. *Coney*, 290 U.S. 169, 172, cited by appellees, this Court reviewed the statute in question on the matter of uncertainty and indefiniteness and found in favor of its validity.

Appellees further make the novel contention that because there was no testimony by appellants to the effect that they are directly affected or injured by the alleged defects in the Act that therefore this court is not permitted to consider the validity of such provisions. It would not have been competent testimony for these taxpayers to have testified that they were confused by or misunderstood the assailed provisions of the Act, or that they were suffering injury from the same. That appellants are affected by the challenged provisions of the Act claimed to be vague and uncertain does not require proof by their testimony. This Court is presented with propositions of law to be passed upon on the basis of the law and the facts in evidence. If these terms and classifications are so arbitrary, indefinite and uncertain that they violate the Equal Protection Clause, then the provisions must be struck down.

Likewise, when appellees state that there was no testimony in the record that any plaintiff in this case desired to operate a four-wheeled vehicle weighing in excess of thirty thousand (30,000) pounds, they are suggesting that the trial court might properly have heard testimony as to the desires and intentions of the plaintiffs which, needless to say, would not be competent and to which counsel for the State would most vigorously have objected.

In Paragraph 1, Page 46 of their brief, appellees strain to harmonize sub-sections (h) and (i) of Section 9 of the Act set out below:

> "(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.
>
> "(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00."

Appellees contend that sub-section (h) "comprises four-wheeled vehicles and vehicles having more than four wheels in the gross weight range from 20,000 to 24,000 pounds." That this construction is plainly incorrect is shown by observing that sub-section (i) uses the statutory language "four or more wheeled vehicles having a gross weight . . . " If the legislative draftsman had meant sub-section (h) to comprise "four or more wheeled vehicles having a gross weight of more than 20,000 pounds and not more than 24,000 pounds," as contended for by appellees, he would have so stated, as he did in sub-section (i)! The fact that sub-section (h) does not contain such language is evidence enough that the construction urged by appellees is incorrect.

In Paragraph 2 on Page 47 of appellees' brief they attempt to harmonize subsections (i-3) and (i-4) of Section 9 and state that vehicles having ten or more wheels are to

be taxed under sub-section (i-4) and not under sub-section (i-3) of Section 9. These sub-sections read as follows:

> "(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.
>
> "(i-4) Ten or more wheeled vehicles having a gross weight of more than fifty thousand (50,000) pounds, but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00."

It would appear that vehicles having ten or more wheels come within both sub-sections. We point out to the court that by appellee's strained construction of sub-section (i-3) "8 or more" means "'8 or 9 but not 10 wheels!" Yet, elsewhere in Section 9 the words "or more" are given their commonly accepted meaning—apparently even by appellees.

In Paragraph 3, Page 47 of their brief, appellees discuss the question of discrimination against trucks in favor of a certain class of busses. They entirely miss the point urged by appellants in our brief. We do not complain of the separate classification of passenger-carrying vehicles on the one hand and freight-carrying vehicles on the other. What we do complain of is a special and lower rate of tax for busses operating "entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto or a close radius thereof and equipped with hydraulic shock absorbers and whose rates are subject to regulation of the Illinois Commerce Commission." Appellees entirely beg the question when they state that the legislature is free to make a separate classification of passenger-carrying vehicles which are charged a lower tax rate than trucks and other busses.

Appellees on Page 49 of their brief confidently construe sub-section (i) of Section 9, quoted above, as including six or more wheeled vehicles weighing from 24,000 to 30,000 pounds. We submit that this confidence is misplaced in view of their construction of sub-section (i-3) where they construe "8 or more" wheels to mean "8 or 9 but not 10" wheels. By the same construction, the words "four or more" in sub-section (i) would have to mean "4 or 5 but not 6 wheels"! Appellees obviously attribute meanings to words and phrases in the statute to suit their own purpose, regardless of their commonly accepted meaning and with startling inconsistency.

In paragraph 5 on Page 49 of their brief, appellees again beg the question when they say that there is no discrimination in the Act in favor of owners of a tractor alone because such tractors "*must* be registered." We only pose the question "Why?", for nothing in the Act would require the owner of such a vehicle to pay a tax except in combination with a semi-trailer.

In support of their contention in Paragraph 7 on Page 51 of their brief that the phrase "like exemption and privileges" is not vague, uncertain and incapable of clear understanding, appellees conclude—"All that is required is the measurement of the motor vehicle tax provisions of another state's laws against the provisions of the Illinois law." Appellants do not suggest, however, how this measurement is to be made, and we submit that the Secretary of State is given no clear standard by which to make the comparison.

When appellees attempt to find approval for the phrase "agricultural pursuits" and cite language of the Illinois Supreme Court in *Bode et al.* v. *Barrett et al.*, 412 Ill. 204, 234, they do not even apply language pertaining to the question of the vagueness and uncertainty of that phrase, for the Illinois Court was there considering the agricultural

exemption contained in Section 9 insofar as it constitutes a separate exempt classification for certain vehicles. The vagueness and uncertainty of this term raises a very real and practical issue for these and other taxpayers. For example, Marion Field, who engages in the business of carrying livestock and feed (R. 80), might claim exemption under the Act as one engaged in "agricultural pursuits."

We submit that appellees in their brief have illustrated most forcibly the confusion in the 1951 Amendment of which we complain. The terms "close radius thereof," "like exemption and privileges," "agricultural pursuits," "maximum load" and "gross weight," must mystify and confuse the Illinois truckers, when they lead to the inconsistent, strained and uncertain meanings which appellees ascribe to them. Furthermore, appellees are unable to satisfactorily explain away the obvious overlapping of provisions, the omission of certain vehicles from the Act and the arbitrary creation of a special class of busses.

We submit, therefore, that because of these defects the 1951 Act is repugnant to the Equal Protection Clause of the Constitution of the United States and invalid.

Respectfully submitted,

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois.

REID and OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
AUG 15 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS,
A CORPORATION, ET AL.,
Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

SAM ALSCHULER,
FRANK R. REID, JR.,
Counsel for Appellants.

PUTNAM, JOHNSON AND ALSCHULER,
REID AND OCHSENSCHLAGER,
Of Counsel.

INDEX

Subject Index

	Page
Jurisdictional statement in support of petition of Co-ordinated Transport, Inc. of Illinois, et al., for appeal to the Supreme Court of the United States	1
Statutory provisions sustaining jurisdiction	2
State statutes the validity of which is involved	2
Date of decree and application for appeal	2
Nature of case	3
This case is not controlled by *Bode* v. *Barrett*	5
The parties	6
The economic interests of the parties	6
The issues	7
The evidence	9
Citation of authority	11
Conclusion	14
Appendix "A"—An act to amend sections 9, 11a and 20 and to repeal sections 9(b), 9(c), 9(d), 9(e), 9(f), 9(g), 9(h), 9(i), 9(j), 9(k), and 9(l) of the "Motor Vehicle Law," approved June 30, 1919, as amended	15
Appendix "B"—Opinion of the Supreme Court of the State of Illinois	23

Table of Cases Cited

Bode v. *Barrett*, 412 Ill. 204	4
Bryant, New York ex rel. v. *Zimmerman*, 278 U.S. 63, 73 L. ed. 184	11
Clark v. *Poor*, 274 U.S. 554, 71 L. ed. 1199, 47 S. Ct. 702	12
Co-ordinated Transport, et al. v. *Barrett, et al.*, Docket No. 32,400, Agenda 27, May, 1952, Supreme Court of Illinois	13
Hendrick v. *Maryland*, 235 U.S. 610, 59 L. ed. 385, 35 S. Ct. 140	12
Hicklin v. *Coney*, 290 U.S. 169, 78 L. ed. 247, 54 S. Ct. 142	12

Page

Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 75 L. ed. 953, 51 S. Ct. 380 12
Kane v. *New Jersey*, 242 U.S. 160, 61 L. ed. 22, 37 S. Ct. 30 12
Schuylkill v. *Pennsylvania*, 206 U.S. 113, 80 L. ed. 91 12
Sprout v. *South Bend*, 277 U.S. 163, 72 L. ed. 833, 48 S. Ct. 502, 62 A.L.R. 45 12

STATUTES AND AUTHORITIES CITED

Constitution of the United States:
Article I, Section 8 ..... 2, 3, 11
Fourteenth Amendment, Section 1 ..... 2, 3, 11
Illinois Revised Statutes 1951, Chapter 95½, Section 9, et seq. (An act to amend sections 9, 11(a) and 20 and to repeal sections 9(b), 9(c), 9(d), 9(e), 9(f), 9(g), 9(h), 9(i), 9(j), 9(k) and 9(l) of the "Motor Vehicle Law", approved June 30, 1919, as amended) 2
Illinois Revised Statutes 1951, Chapter 102, Sections 11-16 7
Reciprocal Guide for Motor Vehicles 4
United States Code Annotated, Title 28, Section 1257, Subsection 2 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT IN SUPPORT OF PETITION OF CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, ET AL., FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Sherman Minton, Justice of the Supreme Court of the United States:

The following statement in writing is made in accordance with Rule 12 of the Rules of the Supreme Court of the United States:

1. Reference is hereby made to subsection (2) of Section 1257 of Title 28 of the United States Code to sustain the right of petitioners to appeal from the final decree of the.

Supreme Court of the State of Illinois, the pertinent portions of which are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> * * * "

2. Reference is made to "An Act to Amend Sections 9, 11 (a) and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k) and 9 (l) of the 'Motor Vehicle Law,' approved June 30, 1919 as amended," (Ill. Rev. Stats 1951, Chap. 95½, Sec. 9, et seq.), which act is claimed to be unconstitutional and void in its entirety. Said act is set forth verbatim as Appendix "A" to this jurisdictional statement.

3. The final decree of the Supreme Court of Illinois sought to be reviewed, sustaining the validity of the statute in question, was entered on the 4th day of June, 1952.

4. The application for appeal is presented to the Honorable Sherman Minton, Justice of the Supreme Court of the United States, on the 15th day of July, 1952.

5. The plaintiffs-appellees filed a complaint in the Circuit Court of Kane County, Illinois on behalf of themselves and all others similarly situated to enjoin the enforcement of said statute and have said statute declared unconstitutional. The complaint charged that said statute was unconstitutional and void and violated the provisions of Section 8 of Article I and Section 1 of Amendment XIV of the Constitution of the United States.

6. The appellants filed an answer denying the allegations of the complaint, and evidence was introduced by both parties.

7. On January 15, 1952, the Circuit Court of Kane County, Illinois entered a decree finding that said act violated said constitutional provisions and holding said act unconstitutional.

8. Said decree was appealed to the Supreme Court of Illinois by the defendants-appellants. On June 4, 1952, the Supreme Court of the State of Illinois entered an order reversing and setting aside said decree, and its decision was in favor of the validity and constitutionality of said statute. The opinion of the Supreme Court of Illinois in said case is hereto attached.

9. Said complaint alleged that said statute was repugnant to numerous provisions of the Constitution of the United States and to the Constitution of the State of Illinois.

10. Paragraph 4 of said complaint alleged that said statute violated Section 8 of Article I and Section 1 of Amendment XIV to the Constitution of the United States (R. 30).

11. Paragraph 5 of said complaint alleged that the taxes imposed by said statute are so excessive in amount that they are confiscatory and in violation of the constitutional provisions set forth above (R. 30-31).

12. Paragraph 6 of the complaint alleged that the tax imposed by said act constituted an undue burden upon interstate commerce and is a discrimination against interstate commerce, was greatly in excess of a fair contribution from the plaintiffs and all others in the same class for the privilege enjoyed by them of using the highways of the State of Illinois, and was in violation of said constitutional provisions (R. 31-32-33-34-35).

13. Paragraph 7 of said complaint alleged that the tax imposed by said statute was confiscatory, arbitrary, unrea-

sonable and void, in violation of said constitutional provisions (R. 35).

14. Paragraphs 8 and 9 of said complaint alleged that said act denied to the plaintiffs and others similarly situated the equal protection of the laws, in violation of said constitutional provisions (R. 35-36-37).

15. Paragraph 10 of said complaint alleged that said statute contained numerous arbitrary, inconsistent, vague and uncertain classifications, in violation of said constitutional provisions (R. 37-38).

15a. The evidence consisted of testimony as to the effect of the act on the truck industry of a truck expert, of a transportation expert, and of officials of the State of Illinois (R. 270 through 668). Many exhibits showing mileages of different types of carriers were introduced (R. 209-241). The Reciprocal Guide for Motor Vehicles, published by the Secretary of State, which is a summary of the agreements of the State of Illinois and other states concerning reciprocity, was introduced as Plaintiffs' Exhibit 10 (R. 263).

16. The opinion of the Supreme Court of Illinois in the decree here appealed from summarizes the issues presented as follows:

> "The decree found, as was alleged in the complaint, that the act was in violation of the provisions of section 8 of article I, and section 1 of amendment XIV of the constitution of the United States and of article III, section 2 of article II, sections 1, 2, 3, and 10 of article IX, and section 13 of article IV of the constitution of the State of Illinois, and therefore unconstitutional, void, and of no legal force.
>
> "Each of the issues as to unconstitutionality presented in the pleadings, briefs and arguments in the instant case was presented to and decided by this court in its recent decision in the case of *Bode* v. *Barrett*, 412 Ill. 204, opinion rendered March 20, 1952, with the

exception of the issue raised under section 13 of article IV of the Illinois constitution.

"Plaintiffs make the further contention that the 1951 amendment is confiscatory and violative of the fourteenth amendment to the United States constitution and of article II of the Illinois constitution; also that it violates article III of the Illinois constitution in unlawfully delegating legislative authority to the Secretary of State; that the taxes imposed constitute property taxes invalid under article IX of the Illinois constitution because it was not based upon value; also, that the equal protection of the laws guaranteed under both the Illinois and United States constitutions is denied them by the provision relating to agricultural exemptions contained in section IX of the act. These same problems were all earnestly considered by the court in the *Bode* case. We adhere to our conclusions reached therein."

The opinion of the court was necessarily a decision on the various federal constitutional issues raised by the plaintiffs. The constitutional issues were raised, and therefore, must necessarily have been decided, even though the court based its decision on the case of *Bode* v. *Barrett*.

This Case Is Not Controlled By Bode v. Barrett

The Supreme Court of Illinois rendered an opinion in the case of *Bode* v. *Barrett, et al.*, on March 20, 1952. That case is now pending on appeal before this Honorable Court, but this case is not controlled by *Bode* v. *Barrett*. The case differs from *Bode* v. *Barrett* in:

A. The parties
B. The economic interests of the parties
C. The issues
D. The evidence

A. The Parties

The plaintiffs in the *Bode* case were eleven (11) in number. The witnesses for the plaintiffs in the *Bode* case were all local carriers engaged only in intrastate operations, and more than half of them were farmers in the Springfield area. In the instant case the plaintiffs numbered more than fifty (50) carriers representing every type of interstate and intrastate hauler, contract carrier, common carrier, private carrier, line haul, short haul and local carrier, and truck broker.

B. The Economic Interests of the Parties

It is clear that the economic interests of the plaintiffs and their witnesses in the *Bode* case were different and even divergent from those of the plaintiffs in this case, since the operations of those in the *Bode* case were wholly intrastate in character, while in the instant case the plaintiffs were engaged substantially in interstate operations. This difference in interest is borne out by a reference to appellees' brief in the *Bode* case. In urging that the 1951 Act is unconstitutional in that it is discriminatory, the plaintiffs in the *Bode* case charged that the discrimination was against the private carrier and local carrier (Appellees' Brief, pp. 44-46, et seq.) Although no plaintiff was engaged in interstate commerce, appellees' brief in the *Bode* case attacked the 1951 Act as violating the Commerce Clause of the Federal Constitution, doing so on the limited ground that the tax constituted an undue burden because of the discrimination arising out of its reciprocity provisions. Valid as that ground is, it is not the basis upon which we rely in contending that the tax is an undue burden on interstate commerce. However, carriers engaged solely in intrastate operations could not be expected to urge fully the issues relating to interstate commerce. We contend

that the Act is unconstitutional and an undue burden on interstate commerce because it is excessive in amount, bears no reasonable relationship to the privilege of using the highway and is discriminatory.

The interests of the plaintiffs in the Sangamon County suit likewise differed for the reason that they were concerned largely with fees for light and medium weight trucks used in local and short-distance hauling, while we are concerned as well with the entire fee schedule and the discrimination against the heavier vehicle. It is evident from the brief and transcript of the oral argument of appellees in the *Bode* case that the issues of unconstitutionality urged therein were, understandably enough, the issues which affected them as local and private carriers operating entirely within the State.

C. The Issues

The only feature in common between the two suits was that each sought to have the 1951 Act declared unconstitutional. Plaintiffs in the *Bode* case sued as citizens and taxpayers of Illinois pursuant to the Act authorizing suits in equity by taxpayers to restrain the disbursement of public moneys by State officials. Ill. Rev. Stats. 1951, Chap. 102, Secs. 11-16. The instant suit, on the other hand, was a suit in equity brought by motor carriers, against the Secretary of State and other officials charged with enforcement of said Act, seeking by injunction to restrain its enforcement and to have a declaratory judgment rendered declaring said Act unconstitutional.

Some of the issues involving the Constitution of the United States were touched upon in the *Bode* case, but many were not even discussed and many were approached from an entirely different and limited point of view, and the decision in the *Bode* case is not controlling of the issues which are here presented.

First: The tax is unconstitutional in that it violates the Commerce Clause of the Constitution of the United States. In the *Bode* case the plaintiffs attacked the Act on the ground that it violated the Commerce Clause, but on the very limited ground that it constituted an undue burden because of the discrimination arising out of its reciprocity provisions. It is our contention that the Act is unconstitutional and an undue burden on interstate commerce because it is excessive in amount, bears no reasonable relationship to the privilege of using the highway and is discriminatory.

Second: By reason of the excessive amount of the tax, the entire trucking industry or a large segment of the industry is confiscated and prohibited. In the *Bode* case confiscation was raised only with reference to private or local carriers, and the testimony of only four affected carriers was presented to the Court. The testimony in this case was far more extensive and demonstrated to the satisfaction of the Trial Court that both interstate and intrastate carriers were affected, and in view of the volume of the evidence we contend not that a few scattered carriers are affected, but rather that the entire industry, or a large segment thereof, is illegally prohibited by operation of the excessive tax.

Third: This Act contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of the Constitution of the United States. This point was raised in the *Bode* case but was raised solely from the effect that these uncertain classifications had upon the local carrier. They took the position that the Act discriminated against the local carrier in favor of the line haul and common carrier. We contend that the Act is unconstitutional insofar as all of the trucking industry is concerned.

Fourth: The agricultural exemption contained in Section 9 is unconstitutional. This point was attacked in the *Bode*

case from the point of view of unlawful delegation of authority, while we attack it directly as being unconstitutional in that it is an unreasonable classification.

D. The Evidence

In addition, a further significant difference should be pointed out to the court with reference to the evidence in this case and the evidence in the *Bode* case. Defendants in both of these cases introduced evidence by way of oral testimony and exhibits to show that the basis for the tax schedule in the 1951 Act was the so-called "ton-mile theory" applied to all vehicles at the ton-mile rate now imposed on passenger cars.

Plaintiffs in the *Bode* case made no attempt to challenge the validity of this theory as the basis for a constitutional tax and did not introduce any evidence to show the unconstitutionality of the tax basis. In the instant case, plaintiffs offered the testimony of Professor John S. Worley, a recognized leader in the field of highway engineering and administration, which revealed that the ton-mile theory as applied by the authors of this tax was so fundamentally unsound as to be excessive in some classifications by as much as 300% and, hence, patently arbitrary and discriminatory. Throughout his analysis Professor Worley proceeded on the assumption that the total revenue sought under the 1951 Act is reasonably required to meet state highway needs, and plaintiffs did not question the estimate of needed revenue for road purposes which the state made. Plaintiffs did, however, vigorously attack the theory upon which was based the registration fee schedule for raising the estimated required revenue. In doing so, we contend that the theory results in a schedule that is discriminatory and excessive.

Summarizing the testimony of Professor Worley attacking the theory behind the tax schedule in the 1951 Act,

he testified that numerous items of highway cost have no relation to the weight of the vehicles passing over the highways. Costs such as grading, fencing, signs, signals, landscaping, roadside parks, right-of-way, diversion of funds to other uses than highway uses, etc., quite obviously are not affected by the weight of vehicles passing over state roads. Other costs, on the other hand, are related wholly or partly to the vehicular weight of traffic. Under this common-sense distinction, some 60% of highway costs is not affected by weight, while 40% is. Defendants' witness did not deny that some highway costs were not affected by weight, but stated that they could not be accurately measured. Defendants' exhibit 7 in support of the 1951 Act fee schedule shows that weight (expressed in terms of "ton-mile") was the sole criterion in distributing highway costs among the various classes of trucks. For comparison with defendants' exhibit 7, Professor Worley prepared six corresponding exhibits (plaintiffs' exhibits 11-16, incl.) in which the various items of highway cost are broken down into those costs affected by weight and those not affected by weight; that portion of total highway costs affected by weight was then distributed among the vehicle classifications on a ton-mile basis, and that portion not affected by weight was distributed on a vehicle-mile basis. The resultant tax schedule appears in plaintiffs' exhibit 15.

It is not plaintiffs' position that any particular tax schedule is the only constitutional schedule; it is our position that any fee schedule purporting to tax for the privilege of road use is unconstitutional if it is in fact arbitrary, unreasonable and discriminatory. The 1951 Act contains such a fee schedule and in some vehicle classifications is as much as 300% in excess of the fee that properly could be charged for the privilege of road use.

Only four witnesses in the *Bode* case testified that the tax increase would exceed their net profits so as to force them

out of business. In the case at bar some seventeen truckers testified to this same effect, with this very important difference: in the *Bode* case the witnesses were all local carriers, whereas in the instant case the witnesses included every type of carrier: line haul, short haul, contract, local and private hauler, interstate, intrastate operator and truck broker. These witnesses, moreover, are owners and operators of all types of equipment. In addition, two officials of banks which heretofore had engaged heavily in truck financing testified that they had already substantially curtailed their truck loans because of the greatly increased tax and its consequent effect upon the ability of truckers to pay for their equipment. Thus, by the testimony of a representative cross-section of the trucking industry and of parties engaged in truck financing, it was conclusively demonstrated that the new tax will be confiscatory both as to the individual business of the witnesses and as to the trucking industry as a whole in all its branches in Illinois.

Thus, it is apparent that the case of *Bode, et al.* v. *Barrett, et al.*, is not the same as this case and that the decision in the former should not control in this case.

Citation of Authority

As pointed out above, the Supreme Court of Illinois in this case in the opinion rendered June 4, 1952, states that the plaintiffs have drawn in question the repugnancy of this amendment to the Motor Vehicle Laws to Section 8, Article I of the Constitution of the United States, and to the XIV Amendment to the Constitution of the United States. There can be no question that the repugnancy of this statute to the Constitution of the United States was an issue before the Supreme Court of the State of Illinois. The cases which sustained jurisdiction are as follows:

New York ex rel Bryant v. *Zimmerman*, 278 U. S. 63; 73 L. Ed. 184.

In this case the court said, on page 67:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

In *Schuylkill* v. *Pennsylvania*, 206 U. S. 113, 80 L. Ed. 91, the court said, on page 121:

> "Whether the point was in fact raised in the court below is itself a federal question and we are bound to examine the record to resolve it."

Other cases in which this court has taken jurisdiction to decide the validity of similar statutes of other states are as follows:

Hendrick v. *Maryland*, 235 U. S. 610; 59 L. Ed. 385; 35 S. Ct. 140 (1915);

Kane v. *New Jersey*, 242 U. S. 160; 61 L. Ed. 22; 37 S. Ct. 30 (1916);

Clark v. *Poor*, 274 U. S. 554; 71 L. Ed. 1199; 47 S. Ct. 702 (1927);

Sprout v. *South Bend*, 277 U. S. 163; 72 L. Ed. 833; 48 S. Ct. 502; 62 A.L.R. 45 (1928);

Interstate Transit, Inc. v. *Lindsey*, 283 U. S. 183; 75 L. Ed. 953; 51 S. Ct. 380 (1931);

Hicklin v. *Coney*, 290 U. S. 169; 78 L. Ed. 247; 54 S. Ct. 142 (1933).

The grounds on which it is believed that the questions raised are substantial are:

(a) The statute involved is designed to raise a revenue of $20,000,000.00 per year.

(b) The plaintiffs involved are more than 50 in number and represent every type of interstate and intrastate hauler, contract carrier, common carrier, private carrier, line haul, short haul and local carrier doing business in the State of Illinois. Furthermore, this suit was a representative suit on behalf of all others similarly situated to the plaintiffs (R. 2-31).

(c) The owners of over 347,000 trucks and buses and over 58,000 trailers are affected in the license fees assessed (R. 497).

(d) The many thousands of interstate carriers that use the highways of the State of Illinois at any time during the year are affected by the statute.

(e) All truck owners residing in and doing business in Illinois are affected by the arbitrary character of the law in question.

(f) The terrific amount of tax imposed by this statute, which amount is so much greater than has ever been assessed by any other state that it in itself constitutes an undue burden on interstate commerce.

17. Appendix "B" is a copy of the opinion of the Supreme Court of Illinois in the case here appealed, *Co-Ordinated Transport, et al.* v. *Edward J. Barrett, et al.*, No. 32400.

18. The stage of the proceedings in which the questions were raised in the Circuit Court of Kane County, being the court of first instance, was the complaint (R. 26).

19. The method of raising was a prayer for injunction against the enforcement of the act and for a declaratory judgment that the act was void. The federal questions were specifically stated in the complaint.

20. The method of raising the federal questions was by obtaining an injunction against the enforcement of the act and a declaratory judgment finding that the act was invalid and by appeal by the defendants to the Supreme Court of Illinois, which reversed the decree of the Circuit Court of Kane County, Illinois and passed upon the federal questions in its opinion.

Conclusion

The main issue involved in this case was the repugnancy of a statute to the Constitution of the United States, and there can be no question that this court has jurisdiction to hear this appeal.

Respectfully submitted,

SAM ALSCHULER,
FRANK R. REID, JR.,
Counsel for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois,
Phone: 4284.

REID AND OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Phone: 4202.

APPENDIX "A"

An Act to amend Sections 9, 11a and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (k) and 9 (l) of the "Motor Vehicle Law", approved June 30, 1919 as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. Sections 9, 11a and 20 of the "Motor Vehicle Law", approved June 30, 1919, as amended, are amended to read as follows:

SECTION 9. All owners of vehicles of the second division as described in Section 2 of this Act, which are designed or equipped or used for carrying freight, goods, wares or merchandise, and all owners of vehicles of said first division which have been remodeled and are being used for such purposes, and all owners of selfpropelled vehicles operated as tractors to the weights of which are added the gross weights of the heaviest semi-trailers with their loads used with such tractors, and all owners of vehicles of said second division which are used for carrying more than seven persons, shall pay to the Secretary of State for each calendar year from and after January 1, 1936, for the use of the public highways of this State, a license fee of five dollars ($5.00) for each such vehicle.

Every application for registration of a truck subject to regulation under the provisions of "An Act in relation to the regulation of the operations of trucks designed or used for the transportation of property", approved July 25, 1939, as amended, shall, be accompanied by proof that a valid and unrevoked certificate of safety has been issued for each such truck. No certificate of registration or license plates shall be issued by the Secretary of State to the owner or any such truck unless such proof accompanies such application.

Every owner of a motor vehicle subject to the provisions of this section shall pay to the Secretary of State for each

calendar year from and after January 1, 1952, for the use of the public highways a tax at the following rates, to-wit:

(a) Vehicles having a gross weight of three thousand (3000) pounds and less, including the weight of the vehicle and maximum load, $5.00.

(b) Vehicles having a gross weight of more than three thousand (3000) pounds and not more than eight thousand (8000) pounds, including the weight of the vehicle and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(c) Vehicles having a gross weight of more than eight thousand (8000) pounds and not more than ten thousand (10,000) pounds, including the weight of the vehicle and maximum load, $41.00 until January 1, 1954, and thereafter $58.00.

(d) Vehicles having a gross weight of more than ten thousand (10,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, $62.00 until January 1, 1954, and thereafter $87.00.

(e) Vehicles having a gross weight of more than twelve thousand (12,000) pounds and not more than fourteen thousand (14,000) pounds, including the weight of the vehicle and maximum load, $81.00 until January 1, 1954, and thereafter $114.00.

(f) Vehicles having a gross weight of more than fourteen thousand (14,000) pounds and not more than sixteen thousand (16,000) pounds, including the weight of the vehicle and maximum load, $101.00 until January 1, 1954, and thereafter $141.00.

(g) Vehicles having a gross weight of more than sixteen thousand (16,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the vehicle and maximum load, $154.00 until January 1, 1954, and thereafter $216.00.

(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the

vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00

(h-1) Four wheel vehicles designed and used for the carrying of more than seven passengers and equipped with balloon tires and hydraulic shock absorbers and having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $389.00 until January 1, 1954, and thereafter $545.00.

(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00.

Six or more wheeled vehicles having a gross weight of more than thirty thousand (30,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicles and maximum load, $579.00 until January 1, 1954, and thereafte $810.00.

Six or more wheeled vehicles having a gross weight of over thirty-six thousand (36,000) pounds, but not exceeding forty-one thousand (41,000) pounds, including the weight of the vehicle and maximum load, $635.00 until January 1, 1954, and thereafter $890.00.

(i-1) Six or more wheeled vehicles having a gross weight of more than forty-one thousand (41,000) pounds, but not exceeding forty-five thousand (45,000) pounds, including the weight of the vehicle and maximum load, $700.00 until January 1, 1954, and thereafter $980.00.

(i-2) Eight or more wheeled vehicles having a gross weight of more than forty-five thousand (45,000) pounds, but not exceeding fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $784.00 until January 1, 1954, and thereafter $1098.00.

(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.

(i-4) Ten or more wheeled vehicles having a gross weight

of more than fifty thousand (50,000) pounds, but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00.

(j) A self-propelled vehicle operated as a tractor and one semi-trailer shall be considered as one vehicle in computing the above license fees. A semi-trailer used with any device for converting it to a trailer or attached to a leading trailer or semi-trailer shall be licensed as a trailer.

(k) Each additional semi-trailer to be used with a tractor licensed as above, $5.00.

(l) Tractors, traction engines or other similar vehicles used for hauling purposes, except as hereinafter provided, shall pay the same fees according to their weight as hereinbefore required in this section of other vehicles. All owners of trailers used with a motor vehicle shall pay to the Secretary of State for each calendar year from and after January 1, 1952, flat weight taxes for the use of the public highways of this State at the following rates to-wit:

(1) Trailers having a gross weight of 2,000 pounds and less, including the weight of the trailer and maximum load, $1.00.

(2) Trailers having a gross weight of more than two thousand (2,000) pounds, and not more than five thousand (5,000) pounds, including the weight of the trailer and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(3) Trailers having a gross weight of more than five thousand (5,000) pounds, and not more than ten thousand (10,000) pounds, including the weight of the trailer and maximum load, $44.00 until January 1, 1954, and thereafter $61.00.

(4) Trailers having a gross weight of more than ten thousand (10,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the trailer and maximum load, $79.00 until January 1, 1954, and thereafter $111.00.

(5) Trailers having a gross weight of more than fifteen thousand (15,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the trailer and

maximum load, $125.00 until January 1, 1954, and thereafter $175.00.

(6) Trailers having a gross weight of more than twenty thousand (20,000) pounds, and not more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $57.00 until January 1, 1954, and thereafter $780.00.

(7) Trailers having a gross weight of more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

Two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:

(1) Such vehicles having a gross weight of more than twelve thousand (12,000) pounds but not exceeding fourteen thousand (14,000) pounds, including the weight of the vehicle and the maximum load, $45.00;

(2) Such vehicles having a gross weight of more than fourteen thousand (14,000) pounds but not exceeding sixteen thousand (16,000) pounds including the weight of the vehicle and the maximum load, $70.00;

(3) Such vehicles having a gross weight of more than sixteen thousand (16,000) pounds but not exceeding twenty thousand (20,000) pounds including the weight of the vehicle and the maximum load, $105.00;

(4) Such vehicles having a gross weight of more than twenty thousand (20,000) pounds but not exceeding twenty-four thousand (24,000) pounds including the weight of the vehicle and the maximum load, $145.00;

(5) Such vehicles having a gross weight of more than twenty-four thousand (24,000) pounds but not exceeding thirty-six thousand (36,000) pounds including the weight of the vehicle and the maximum load, $195.00.

The registration fee paid by the State of Illinois, or by any county, township, municipal corporation, city, village or incorporated town for each motor vehicle of the second division owned and operated by it, or by any school district for each motor vehicle of the second division owned and operated by it as a school bus, shall be two dollars for each calendar year.

Upon the filing in the office of the Secretary of State of said application and payment of the registration fee as hereinbefore provided, the Secretary of State, or his duly authorized agent, shall, without further fee, assign to such trailer or semi-trailer as described in said application, a distinctive number plate which shall be attached to the rear of the trailer or semi-trailer. Such license plate shall be so attached as not to swing loosely and shall be not less than twenty inches above the surface of the ground. It shall at all times be kept clean from grease and dirt. None of the owners of the vehicles of said second division shall be required to pay the registration fees in section 8 of this Act. Provided, that none of the provisions of this act requiring or prescribing registration shall be construed to include farm tractors, traction engines, threshing machines, clover huller, ensilage cutters, corn shredders, corn sheller, corn grinders, hay presses, portable saw mills, binders, combines, farm machinery and implements, farm wagons, or like vehicles, trailers or semi-trailers used in connection therewith, which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, or vehicles used exclusively for moving water well drilling outfits, but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers, or semi-trailers engaged in transporting agricultural products. The owner of any motor vehicle of the second division having a corn sheller, a well driller, hay press, clover huller or farm machinery permanently mounted thereon and used solely for transporting the same, shall pay the license fee of five dollars ($5.00), provided in the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act; Provided, that no such owner shall be entitled to any reduction in such five

dollar ($5.00) license fee for the reason that such fee may first become payable during the second half of the calendar year.

Section 11a. Any person, firm or corporation who shall violate any of the provisions of Sections 3a, 9 or 10 shall be subject to a penalty of not less than $10.00, nor more than $100.00 for each offense, together with costs of suit, and shall also be held liable for the payment of all damages caused to any public highway by such violation. Any vehicle used in violation of any section of this Act and thereby causing damage to any public highway shall be subject to a lien for the full amount of all unpaid registration fees, flat weight fees, penalties and damages; provided, however, that such lien shall not release the offender from the full payment of all registration fees, flat weight fees, penalties and damages which may be due from him or be recovered against him in any court of competent jurisdiction and, provided, also that such lien shall not be superior to any chattel mortgage or other lien attaching to such vehicle.

Section 20. Except as herein provided for foreign corporations, the provisions of sections 8, 9, 10, 14, 17, and 27 of this Act, shall not apply to any other motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence: and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by the residents of this State, if, under the laws of such city, state, foreign

country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicle or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned.

In order to effectuate the purposes of this section, the Secretary of State of Illinois shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees and flat taxes under which motor vehicles, trucks, tractors, trailers or semi-trailers properly licensed or registered in other states may be operated in this State without an Illinois registration or the payment of permit fees or flat taxes; provided like privileges are accorded to vehicles owned by Illinois citizens when operated in such other states.

Section 2. Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k), and 9 (l), of said Act are repealed.

Section 3. This amendatory act shall be effective January 1, 1952.

Approved July 9, 1951. (Ill. Rev. Stat., Vol. 2, p. 193.)

APPENDIX "B"

Docket No. 32400—Agenda 27—May, 1952

CO-ORDINATED TRANSPORT, INC., OF ILLINOIS, et al., *Appellees*,

v.

EDWARD J. BARRETT, Secretary of State, et al., *Appellants*

PER CURIAM:

This is a direct appeal by the Secretary of State, the sheriff of Kane County, and the commanding officer of the second district of the State Highway Police of the State of Illinois, defendants below, from a final decree of the circuit court of Kane County which declared unconstitutional and void an act of the Sixty-seventh General Assembly, approved by the Governor of Illinois on July 9, 1951, entitled "An Act to amend Sections 9, 11a and 20 and to repeal Sections 9b, 9c, 9d, 9e, 9f, 9g, 9h, 9i, 9j, 9k and 9l of the 'Motor Vehicle Law,' approved June 30, 1919, as amended," (Laws of 1951, p. 1147,) and which enjoined and restrained the defendants from attempting to enforce the provisions of said act and from interfering with or from stopping or attempting to stop the plaintiffs from using the highways of the State of Illinois by reason of noncompliance with said act, and permanently enjoining the defendants, their agents, servants and employees from instituting any action, civil or criminal, against the plaintiffs under said act.

The decree found, as was alleged in the complaint, that the act was in violation of the provisions of section 8 of article I, and Section 1 of amendment XIV of the constitution of the United States and of article III, section 2 of article II, sections 1, 2, 3, and 10 of article IX, and section 13 of article IV of the constitution of the State of Illinois, and therefore unconstitutional, void, and of no legal force.

Each of the issues as to unconstitutionality presented in the pleadings, briefs and arguments in the instant case was presented to and decided by this court in its recent decision in the case of *Bode* v. *Barrett*, 412 Ill. 204, opinion rendered March 20, 1952, with the exception of the issue raised under section 13 of article IV of the Illinois constitution.

The plaintiffs in the present case constitute more than fifty motor vehicle carriers representing most every type of such carrier in the State of Illinois. The parties do not sue in their representative capacity, as they did in the *Bode case*, but the relief sought is the same as that prayed for in that case. The fact that the economic interests of many of the plaintiffs in this case are not identical with the economic interests of the parties to the *Bode case* does not change the character of the constitutional issues presented and argued in each of the cases.

The testimony of fourteen plaintiff truck operators of various classes and a large volume of documentary evidence was introduced on behalf of the plaintiffs; also two bankers testified to the curtailment of truck loans after the enactment of the amendatory statute. Plaintiffs rely strongly upon the testimony of Professor Worley of the University of Michigan, as presenting an altogether different factual picture than that relied upon by the plaintiffs in the *Bode case*. Professor Worley, an engineer, for the past five years has been identified with numerous State trucking associations. Worley advances a theory and formula upon which a motor vehicle tax schedule can be based. He takes the position that the plan involved in the legislation under consideration is arbitrary and unreasonable. Professor Worley admitted on cross-examination that his theory was highly controversial, and that there was a honest difference of opinion among scientific experts as to the relative merits of the various theories of taxation in this particular field. The record in this case contains the testimony of Frank N. Barker, Chief Highway Engineer of the State of Illinois, which is the same as reported in the *Bode case*.

Without prolonging this opinion with a discussion of the details of the two schools of thought on what constitutes a rational, reasonable and fair motor vehicle license fee, suffice it to say that it clearly becomes a legislative function to choose the one that serves better the needs of the legislation under review. The legislature in this matter has a broad range of discretion and is free to adopt the theory it believes, from its study and exercise of legislative discretion, to be the best. As we said in *Melton* v. *City of Paris*, 333 Ill.

190, 198: "A court will not hold an ordinance void and unreasonable where there is room for a fair difference of opinion upon the question, even though the correctness of the legislative judgment may be doubtful and the court may regard the ordinance as not the best which might be adopted for the purpose."

In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute forbade operation of any motor vehicle carrying a net load of freight exceeding seven thousand pounds. This was attacked as violative of the commerce clause and the fourteenth amendment of the Federal constitution. It was contended that the net load limitation, as contrasted with a possible gross load limitation, was "opposed to sound engineering opinion" and hence invalid. In overruling this contention the court said (page 388): "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

Again the Supreme Court of the United States in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, in discussing factors involved in State motor vehicle tax formulas, said: "These factors, like those relevant in considering the constitutionality of other State taxes, are so countless that we must be content with 'rough approximation' rather than precision."

This court, in the *Bode opinion*, disposed of this precise question adversely to the contentions of the plaintiffs herein. The new evidence offered in the present proceedings does not warrant a reversal of the views there expressed.

The only issue which was not presented to and considered by this court in its decision of the *Bode case* is the contention that the 1951 amendment violates that portion of section 13 of article IV of the Illinois constitution which provides as follows: "No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. * * * No law shall be revised or amended by reference to its title

only but the law revised or the section amended shall be inserted at length in the new Act."

The title of the 1951 amendment is as heretofore set out in the first paragraph of this opinion. The title of the Motor Vehicle Act of 1919, to which the title of the 1951 amendment refers, is "An Act in relation to motor vehicles and to repeal a certain Act therein named."

The first argument of the plaintiffs in respect to this contention is that the act embraces both the subject of police regulations and the subject of revenue, and that the subject of revenue is not embraced in the title of the amendment.

The principles of law applicable generally to this question have been well stated as follows (50 Am. Jr., Statutes, sec. 197, p. 178, *et seq.*): "The constitutional prohibition of more than one subject in an act does not impose any limitation on the comprehensiveness of the subject, which may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject and not several. To constitute plurality of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. Within the meaning of the constitutional provision, matters which apparently constitute distinct and separate subjects are not so where they are not incongruous and diverse to each other. Generally speaking, the courts are agreed that a statute may include every matter germane, referable, auxiliary, incidental, or subsidiary to, and not inconsistent with, or foreign to, the general subject or object of the act. The constitutional provision is not intended, nor should it be so construed as, to prevent the legislature from embracing in one act all matters properly connected with one general subject or object, but the term 'subject' or 'object' as used in these provisions is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters fairly, reasonably, naturally, logically, properly, or directly or indirectly connected with, or related to, each other or the same subject or object. The statute embraces but one subject or object where the matters included

are such that, if traced back, they will lead the mind to the subject as the generic head. On the other hand, an act may not embrace unrelated or unconnected subjects or objects, but the various topics in the body of the act should and must be kindred in nature, and germane to the subject or object. It has been said that there can be no surer test of compliance with the constitutional requirement of singleness of subject than that none of the provisions of an act can be read as relating or germane to any other subject than the one named in the title."

These general principles have been followed in the State of Illinois. In *Public Service Co.* v. *Recktenwald*, 290 Ill. 314, this court, in holding that the provisions for the power of eminent domain in the Public Utilities Act did not render such act void, said as follows:

"The constitutional provision that no act shall embrace more than one subject, which shall be expressed in the title, prohibits the passage of an act containing provisions not fairly embraced in the title and any such provisions are void, and it also prohibits the passage of an act relating to different subjects expressed in the title, in which case the whole act is void. [Citing cases.] The general purpose of the constitutional provision, however, is accomplished when a law has but one general subject, which is fairly indicated by its title. The title is not required to be an index to the body of the act or as comprehensive in matters of detail, but if it fairly indicates the general subject and reasonably covers all the provisions of the act and is not calculated to mislead the General Assembly or the people it is a sufficent compliance with the constitutional requirements. Unless the act contains matters having no proper connection or relation to the title, or the title itself contains subjects having no proper relation to each other, the constitutional provision is not violated. An act having a single general subject indicated in the title may contain any number of provisions, no matter how diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance of such subject by providing for the method and means of carrying out the general object. [Citing cases.]"

Although this particular issue has not heretofore been presented, this court has heretofore been called upon to decide analogous questions as to the validity of the Motor Vehicle Act. In *People* v. *Sargent*, 254 Ill. 514, the validity of the Motor Vehicle Act of 1911 as embracing more than one subject was challenged in reference to the section thereof imposing a penalty for operating or driving a vehicle as a chauffeur on the highways without having had an examination and obtaining a license as such. The title of the act included no reference to penal provisions for violation thereof. In holding the constitution not violated, we said, at page 517: "The word 'subject,' as used in the constitution, signifies the matter or thing forming the groundwork. It may contain many parts which grows out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. Any matter or thing which may reasonably be said to be subservient to the general subject or purpose will be germane and may be properly included in the law."

The same result and reasoning appears in the case of *People* v. *Sisk*, 297 Ill. 314, wherein section 7 of the Motor Vehicle Act, making it a criminal offense to drive a tractor or other metal tired vehicle over the edge of a public highway of the State without protecting the edge by putting down solid planks, was challenged. *People* v. *Stacker*, 322 Ill. 232.

One of the more recent decisions of this court in this respect appears in *Clarke* v. *Storchak*, 384 Ill. 564, wherein we held the "guest statute," added to the Motor Vehicle Act by amendment of 1935, was properly included in the Motor Vehicle Act as incidental or germane to the main purpose of that act as expressed in the title and that the amendment is not invalid as an attempt to amend the Injuries Act.

Recognizing the realities of the Motor Vehicle Act, it constitutes both a regulation of motor vehicles and use of the highways under the police powers of the State and also the imposition of a privilege tax on motor vehicles for the privilege of using the highways as a revenue measure. Since its inception the Motor Vehicle Act has provided that

the revenues derived thereunder should be deposited in a State road fund and used solely for discharging the principal and interest of State road bonds and for the improvement of the highways. The exercise of both the police and revenue powers of the State may be combined in one act, provided they relate to only the one subject in the title and are not inconsistent therewith. *State* v. *Preston*, 103 *Ore.* 631, 206 Pac. 304, 23 A.L.R. 414; *Smallwood* v. *Jeter*, 42 Idaho 169, 244 Pac. 149; *Barnett* v. *State* (Ala.), 102 So. 483; *Wilson* v. *State* (Tenn.), 224 S.W. 168; *Smith* v. *Com.* (Ky.), 194 S.W. 367; *State* v. *Ingalls* (N.Mex.), 135 Pac. 1177.

The 1919 Motor Vehicle Act of Illinois was both a revenue and police power measure, relating to and embracing only one subject, *viz.*, motor vehicles. The title of the 1951 amendment gave the plainest possible notice that the subject of the proposed act was the amendment of sections 9, 11a and 20 of the Motor Vehicle Act and the repeal of certain other sections thereof. As stated in *City of Evanston* v. *Wauzau*, 364 Ill. 198, "An act to amend another act, the former setting out the latter's title, is as comprehensive as the act amended, and any provision which might have been inserted in the original act may be incorporated in the amendatory act without violating the constitutional provison that the subject of an act shall be expressed in the title."

Plaintiffs further contend that the 1951 act amends section 13 of the Motor Vehicle Act without inserting the amended section at length, contrary to section 13 of article IV of the Illinois constitution. Section 13 authorizes and empowers the Secretary of State to institute in the name of the people of the State of Illinois a suit or suits in any court of competent jurisdiction to enforce the collection of any mileage weight fees provided for in the act as well as other fees, fines, penalties or damages. The purpose of the constitutional provision requiring that the amended section of a law be inserted at length in the new act is to avoid the necessity of having to make reference to a prior law to determine and give meaning to an amendatory act. (*People ex rel. Gramlich* v. *City of Peoria*, 374

Ill. 313.) However, if the act is complete in itself, without reference to the general act, it does not contravene the constitutional provision merely for the reason that it repeals, modifies or amends, by implication, the general act. Any new provision of law may in some sense be said to amend and change the prior system of laws, and whenever there is an irreconcilable conflict between two acts the later one must prevail. To the extent of the conflict the later act amends the earlier one by implication, and, if the later act is not amendatory in form and perfect in itself, it is not within the prohibition of the constitution. It is not necessary, when a new act is passed, that all prior acts modified by it by implication shall be re-enacted and published at length. *Hollingsworth* v. *Chicago and Carterville Coal Co.* 243 Ill. 98; *People* v. *Chicago Transit Authority,* 392 Ill. 77.

The 1951 amendment effected amendments to sections 9, 11a and 20 of the Motor Vehicle Act and repealed certain specified sections of that law providing for payment of mileage weight fees. Section 13 of the Motor Vehicle Act is not mentioned or specified in the amendatory act. However, it cannot be said that the 1951 act is amendatory in form as to section 13. The 1951 amendment requires no reference to section 13 in order to be fully understood. It is complete and perfect in itself. The authorities cited by plaintiffs in support of their position involved amendatory acts which were not complete in themselves and which required reference to the prior or basic act being amended in order to be understood. The situation here presented is closely analagous to the situation in *Clarke* v. *Storchak,* 384 Ill. 564, in which the guest statute amendment to the Motor Vehicle Act was sustained, although it did not purport to amend in its title the Illinois Injuries Act.

The 1951 amendment to the Motor Vehicle Act refers to only one subject, *viz.*, motor vehicles, is complete within itself, requires reference to no other act, and is not violative of section 13 of article IV of the constitution.

Plaintiffs make the further contention that the 1951 amendment is confiscatory and violative of the fourteenth amendment to the United States constitution and of arti-

cle II of the Illinois constitution; also that it violates article III of the Illinois constitution in unlawfully delegating legislative authority to the Secretary of State; that the taxes imposed constitute property taxes invalid under article IX of the Illinois constitution because it was not based upon value; also, that the equal protection of the laws guaranteed under both the Illinois and United States constitutions is denied them by the provision relating to agricultural exemptions contained in section IX of the act. These same problems were all earnestly considered by the court in the *Bode case.* We adhere to our conclusions reached therein.

We have given all questions raised on this appeal serious consideration, and we have reached the conclusion, in view of what we have said heretofore and our pronouncements in the recent opinion of *Bode* v. *Barrett,* that the 1951 amendment to the Motor Vehicle Act of Illinois is constitutional, and the decree of the trial court is reversed.

Decree reversed.

Supreme Court, U.S.
FILED
AUG 20 1952
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

LIBRARY
SUPREME COURT, U.S.

No. 274

CO-ORDINATED TRANSPORT, INC. of ILLINOIS, a Corporation, et al.,

Plaintiffs-Appellees,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Defendants-Appellants.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

SAM ALSCHULER,
32 Water St., Aurora, Ill.
FRANK R. REID, JR.,
6 Downer Place, Aurora, Ill.,
Attorneys for Appellants.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

SUBJECT INDEX.

PAGE

Statement 2

Argument 3

I.

This case is not controlled by Bode vs. Barrett 3

II.

A. The tax in the 1951 amendment to the Illinois Motor Vehicle law produces an unlawful burden on Interstate Commerce 7

B. Previously decided case have not considered a tax similar in extent or principal to the one involved in the case at bar 10

III.

The 1951 Amendment to the Motor Vehicle Act of Illinois is confiscatory in violation of the XIV Amendment to the Constitution of the United States 14

IV.

The 1951 Amendment to the Illinois Motor Vehicle Act violates the XIV Amendment to the Constitution of the United States by reason of vague, arbitrary, and inconsistent provisions 19

V.

Conclusion 20

PAGE

TABLE OF CASES AND STATUTES CITED.

Cases Cited.

Aero Mayflower Transit Company v. Railroad Commissioners, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99 13

Bode v. Barrett, 412 Ill. 204, 106 N.E. 2d 521 ..... 3, 5

Capital Greyhound Lines v. Brice, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053, at page 1063 ..... 11, 13

Clark v. Paul Gray, Inc., 306 U.S. 583, 595-6, 59 S. Ct. 744, 83 L. Ed. 1001 8

Dixie Ohio Express Company v. State Rev. Comm., 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 13

Fiscal Court of Owen County et al v. F. & A. Cox Company, 132 Ky. 738, 117 S.W. 296 17

Freeman v. Hewit, 329 U.S. 249, 67 S. Ct. 274, 91, L. Ed. 265 reh. den. in 329 U.S. 832, 67 S. Ct. 497, 91 L. Ed. 705 9

Hendrick v. Maryland, 235 U.S. 610, 621, 35 S. Ct. 536, 59 L. Ed. 385 ..... 8, 12

Interstate Transit v. Lindsey, 283 U.S. 183, 51 S. Ct. 380, 75 L. Ed. 953 13

Magnano Company v. Hamilton, 292 U.S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 15

Massachusetts v. Mellon, 262 U.S. 447, 448, 43 S. Ct. 597, 67 L. Ed. 1078 8

New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184 5

Nichols v. Coolidge, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184 16

PAGE

Puget Sound Stevedoring Co. v. Tax Comm., of State of Washington, 301 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68, 72 9

Schuylkill v. Pennsylvania, 296 U.S. 113, 56 S. Ct. 31, 80 L. Ed. 91 5

Southern Ry. Co. v. King, 217 U.S. 524, 54 L. Ed. 868 8

M. K. & T. Ry. v. Cade, 233 U.S. 642, 648, 34 S. Ct. 678, 58 L. Ed. 1135 8

Tyler v. The United States, 281 U.S. 497, 50 S. Ct. 356, 74 L. Ed. 991, at page 998 16

STATUTES CITED.

Constitution of the United States, Section 8, Article 18, Section 1 of Amendment XIV 3, 14

Judicial Code of the United States, Title 28, Section 1257 (2) 2, 4

An Act to Amend Sections 9, 11(a), and 20, and to cancel Sections 9(b), 9(c), 9(d), 9(e), 9(f), 9(g), 9(h), 9(i), 9(k), 9(l), of the Motor Vehicle Law of the State of Illinois, approved June 30, 1919, as amended. (Ill. Rev. Stats. 1951, Chap. 95½, Section 9, et—seq.) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 274

CO-ORDINATED TRANSPORT, INC. of ILLINOIS, a Corporation, et al.,

Plaintiffs-Appellees,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Defendants-Appellants.

BRIEF OF APPELLANTS OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM.

This brief in opposition to the Motion by Appellees to dismiss or affirm this appeal is submitted in conformity with Rule 7 (3) of the Supreme Court of the United States.

As fully shown in the jurisdictional statement in support of Appellants appeal to the Supreme Court of the United States, the jurisdiction of this court is invoked under and

by virtue of subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States as an appeal from the Final Decree of the Supreme Court of Illinois, wherein the validity of the 1951 Amendment to the Motor Vehicle Law of the State of Illinois is questioned on the grounds of its being repugnant to the Constitution of the United States. The decision by the Supreme Court of Illinois was in favor of the validity of the Statute (..... Ill. ....., 106 N.E. 2d 510), and was entered June 4, 1952.

STATEMENT OF THE CASE.

In this brief opposing the Motion of Appellees to dismiss the appeal, the Appellants point out in affirmation of their jurisdictional statement filed heretofore, that the instant case is not controlled by *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521, and that clearly under subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States this court should deny the motion to dismiss the appeal inasmuch as the constitutionality of the 1951 Amendment of the Illinois Motor Vehicle Law is involved. The said Statute of the State of Illinois places an unlawful burden on Interstate Commerce and goes far beyond any case decided by this or any other court in both the amount and the theory of the tax, being confiscatory in amount and arbitrary in allocation as well as containing vague, arbitrary, and inconsistent provisions, all in violation of the Constitution of the United States.

ARGUMENT.

I.

This case is not controlled by Bode v. Barrett.

The jurisdictional statement which was filed by these appellants when Mr. Justice Minton signed the order allowing the appeal was directed in large measure to demonstrating that the case at bar is not controlled by the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521. As pointed out in the jurisdictional statement the cases differ in (a) the parties, (b) the economic interests of the parties, (c) the issues, (d) the evidence. The only feature in common between the two suits was that each sought to have the 1951 amendment to the Illinois Motor Vehicle Act declared unconstitutional. While it is true that in both cases charges are made that the Statute in question violates Sec. 8 of Article I and Sec. 1 of Amendment XIV to the Constitution of the United States, the evidence presented and the law argued in the two cases are dissimilar, and, indeed, in many instances, completely divergent, since in the *Bode* case the parties were all intrastate carriers, and since most of the parties in the case at bar are interstate carriers. This very fact produces the divergence of economic interests and necessarily, therefore, produces a different approach to the problems involved. Based on this divergence of interest, different issues have been raised in each case and different evidence was introduced in each case. We contend that one of the greatest errors committed by the Supreme Court of Illinois in its opinion in the case at bar was its statement that the issues in this case were presented to and decided by that Court in the *Bode* case.

The repugnancy of the statute in question to the Constitution of the United States was raised in the complaint filed herein in the Circuit Court of Kane County. The issue of repugnancy to the Constitution of the United States of the Statute of Illinois was squarely put before that court and before the Supreme Court of Illinois. The decision of the Supreme Court of Illinois that this case is controlled by *Bode* v. *Barrett* is necessarily a decision on the federal issues involved since federal issues were presented in the court below and since the Supreme Court of Illinois decided those federal issues. The federal questions were decided, and it is immaterial what the basis for that decision was. The issue at this time is whether or not there is a substantial federal question involved in the case; the basis for the court's decision on the federal question is, at this time, immaterial.

It is not here our purpose to set forth the distinctions between the *Bode* case and the case at bar. This we did at length in the jurisdictional statement which is contained in the record which should be before the Court by the time this brief reaches the Court. As we understand it, the appellees' statement opposing jurisdiction and their motion to dismiss or affirm is in effect a brief attempting to respond to that jurisdictional statement. This brief is then in effect a Reply Brief and reiteration of the detailed discussion of the distinctions between the two cases as contained in the jurisdictional statement would serve only to waste the Court's time. We do rely on the distinctions as pointed out in the jurisdictional statement.

Subsection 2 of Section 1257 of Title 28 of the Judicial Code of the United States provides in part as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

> * * * (2) by appeal where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Clearly, the case at bar involves the validity of the 1951 amendment to the Illinois Motor Vehicle Law. The charge that said statute is repugnant to the Constitution of the United States was made in the original Complaint and was persevered in and argued during each step of the proceedings. The final decision of the highest Court of the State of Illinois was in favor of the validity of the said Statute. Obviously, therefore, this case complies exactly with the terms of the Judicial Code and is exactly the type of case wherein this Court may review the decision of the Supreme Court of Illinois. Moreover, as pointed out in the jurisdictional statement, decisions of this Court, such as *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184, and such as *Schuylkill* v. *Pennsylvania*, 296 U.S. 113, 56 S. Ct. 31, 80 L.Ed. 91, have demonstrated that the Court has found that no particular form of words or phrases is essential to determine whether the validity of a State Statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. It is only necessary that the claim of invalidity be brought to the attention of the State Court with fair precision and in due time. Whether the point was in fact raised in the Court below is itself a Federal question and this Court has placed upon itself the burden of examining the record to resolve that question. We submit that Federal questions were presented to the Court below as the record demonstrates, and that this Court has jurisdiction to decide those Federal questions.

Furthermore, we submit that even if the case at bar were controlled by the case of *Bode* v. *Barrett*, 412 Ill. 204, 106

N.E. 2d 521 this Court should still take jurisdiction of this case since this case complies in all respects with the requirements of the Judicial Code. *Bode* v. *Barrett* is pending at this time before this Court, being Docket 187, October Term, 1952. As a matter of fact, the Complaint in the case at bar was filed before the Complaint in *Bode* v. *Barrett*. However, because the Sangamon County Circuit Court heard the *Bode* case a short time before the Kane County Circuit Court heard the case at bar, the *Bode* case has preceded the case at bar through the Illinois Supreme Court to its filing in the United States Supreme Court. Up to this time no final decision has been made in the *Bode* case on the Federal questions therein involved, nor, indeed, has this Court yet determined that there are Federal questions involved in the *Bode* case. Since the issues and the records in the two cases are dissimilar, perhaps if there are Federal questions involved in both cases, this Court should hear the two cases together, thus providing itself an opportunity to consider all of the evidence and all of the issues in making a final determination of the validity of the Illinois statute. If, on the other hand, this Court should determine that no Federal question has been presented in the *Bode* case then certainly the Court has jurisdiction to hear the case at bar and to determine the Federal questions presented herein.

We call to the Court's attention that appellees have filed in this Court a motion to dismiss the appeal or affirm in the *Bode* case. If the Court should grant the motion in the *Bode* case, and dismiss the appeal, the case at bar remains the sole opportunity this Court has to determine the validity of the 1951 Amendment to the Illinois Motor Vehicle Act. Appellees are attempting to play one case against the other in an effort to deprive those affected of their right to a determination by this Court of the Constitutional questions presented.

We, therefore, submit (a) that the case at bar is not controlled by *Bode* v. *Barrett* and must be reviewed because the case at bar involves the validity of a state statute on the ground that it is repugnant to the Constitution of the United States, and the decision below was in favor of its validity, or in the alternative, we submit (b) that even if *Bode* v. *Barrett* is in any sense controlling, the *Bode* case has not yet been decided by this Court on the Federal issues, if any exist in the *Bode* case, and this Court should, to make a complete determination, hear both cases together, and in any event, determine the Federal issues presented in this case.

II.

A.

The tax in the 1951 Amendment to the Illinois Motor Vehicle Law produces an unlawful burden on Interstate Commerce.

The parties plaintiff in this case are clearly entitled to challenge the Illinois Statute upon the ground that it imposes an unlawful burden upon interstate commerce. Their connection with interstate commerce is clearly evident from the record.

For example, Co-Ordinated Transport transports freight in interstate commerce (Abst. 37) in Wisconsin, Illinois, Indiana, and Ohio (Abst. 38); Wagner Transfer does seventy-five per cent (75%) of its work between States (Abst. 53); Alton Box Board operated one million miles outside of Illinois in 1951 (Abst. 61); Plaintiff Young's leased trucks in that same year operated only 200,000 miles within Illinois and 2,300,000 miles outside the State (Abst. 66). Even carriers such as Plaintiff Cain and Plaintiff Ryan are integral parts of interstate commerce; Cain travelled but 2000 of a

total of 55,000 miles outside of Illinois (Abst. 70), but leased his equipment to an interstate carrier with offices outside Illinois (Abst. 69). Ryan is a connecting carrier connecting with interstate operators and shared in a rate set by the Interstate Commerce Commission, although Ryan's entire mileage was in Illinois (Abst. 76).

Those few plaintiffs which appellee states have no concern with interstate commerce are actually engaged in interstate commerce. Plaintiff Haen operates on an interstate exchange of trailers (Abst. 71); Gold Star Motor Service (Church) is a connecting carrier in interstate commerce (Abst. 86), and plaintiff Valentine not only is a terminating carrier in interstate commerce, but does cross country hauling in all 48 states through a lease arrangement with Allied Van Lines (Abst. 96).

These facts in evidence in support of the averments in the complaint that plaintiffs were engaged in interstate commerce clearly bring plaintiffs within that class of persons as to whom the act is unconstitutional as a violation of Art. 1, Sec. 8 of the Constitution of the United States. Because plaintiffs are engaged in interstate commerce they are injured by the burden imposed by the Statute, and thus *Southern Ry. Co.* v. *King*, 217 U.S. 524, 54 L. Ed. 868; *M. K. & T. Ry.* v. *Cade*, 233 U.S. 642, 648, 34 S. Ct. 678, 58 L. Ed. 1135, *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078. *Hendrick* v. *Maryland*, 235 U.S. 610, 621, 35 S. Ct. 536, 59 L. Ed. 385 and *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 595-6, 59 S. Ct. 744, 83 L. Ed. 1001, cited by appellees (Statement Opposing Jurisdiction, p. 5) demonstrate that this Court should take jurisdiction of this case.

Appellees' position is that plaintiffs, despite this obvious participation in interstate commerce, have no right

to complain of the burden on interstate commerce because all the plaintiffs are either residents of Illinois, Illinois corporations or foreign corporations licensed to do business in Illinois with places of business in this state and thus are taxed on a parity with other Illinois operators. This contention hardly merits answer in view of the facts of the case and the numerous decisions of this Court holding that it is the *interstate commerce* which is protected. The place of residence or business of the person conducting such commerce is not controlling;

See: *Puget Sound Stevedoring Co.* v. *Tax Commission of State of Washington*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68, 72.

In *Freeman* v. *Hewit*, 329 U.S.249, 67 S. Ct. 274, 91 L. Ed. 265. *reh. den.* 329 U.S. 832, 67 S. Ct. 497, 91 L. Ed. 705, this Court was faced with a case involving the constitutionality of the Indiana Gross Income Tax on an interstate transaction. The taxpayer was domiciled in Indiana, and the securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the suggestion that because Indiana transactions were likewise taxed at the same rate as interstate transactions, the tax was in all respects proper, the Court stated at p. 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. *It*

cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. *But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce.* The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things." (Italics supplied)

Appellees' contention that a citizen engaged in interstate commerce may question the burdens imposed on interstate commerce of all states but that of his residence, is as absurd as it is novel. The tax in question is imposed only on Illinois highway users. The tax burdens users of Illinois highways alone. By attempting to preclude all Illinois residents and those having places of business therein engaged in interstate commerce from challenging the validity of the Act, appellees would summarily deny relief to those very persons most in need of it.

B.

Previously decided case have not considered a tax similar in extent or principal to the one involved in the case at bar.

In Section II B of the Statement of Appellees Opposing Jurisdiction and Motion to Dismiss or Affirm, the appellees

candidly state that it is their belief that on the merits the appellants' contentions have been denied by this Court in other decisions. It is our belief that appellees are misusing the purpose of a statement opposing jurisdiction to discuss the merits of the case. It is not our purpose here to go into the merits in detail, since we will reserve consideration of the merits until the proper time in this proceeding. However, we cannot leave unanswered the prejudicial statements made by appellees, and we shall, therefore, briefly consider those statements.

Appellees state that this Court has heretofore denied appellants' contentions in "decisions so precisely applicable alike in facts and in principle as to apply a closure to debate." We specifically deny that previous decisions of this Court are like this case either in fact or in principle.

The vast number of cases, some few of which have been cited by appellees, involving licenses or taxes on motor carriers before this Court, indicates that it is the Court's policy to hear these cases upon their individual merits and not to apply the "closure of debate" which appellees suggest, merely because of a similarity in the nature of the tax. As Mr. Justice Frankfurter stated in *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053, at page 1063:

> "Examination of decided cases reveals that the largest flat tax heretofore sustained was $15.00 for six months or $30.00 per year, and the largest annual tax based upon size or weight was $75.00."

And the largest tax of any nature ever sustained by this Court was $750.00, as appears from appendix A to the Brice opinion (94 L. Ed. 1065, 1066). The maximum tax involved in this case is $1588.00 per year. Do appellees contend that a tax of $1588.00 is in any way comparable

in its burden on interstate commerce to a similarly designed tax of $75.00? As Mr. Justice Frankfurter stated in the *Capital Greyhound* case *supra* at page 1063:

> "The problem is inescapably one of determining *how much is too much* in the total nature of the tax. Thus it becomes important to see how Maryland tax compares in amount with similar taxes in prior cases. This is done not to test the tax as individually applied to appellants, but to determine whether general application of a tax of this magnitude may fairly be deemed to burden interstate commerce unduly." (Italics supplied)

We submit that based on the amount of tax involved alone the facts in the case at bar are completely dissimilar from any case heretofore considered by this Court.

So, too, in principle is the record in this case unlike those cases heretofore decided by the Court.

The record in the case at bar contains the testimony of Professor Worley as pointed out by the appellees and as discussed at considerable length in the jurisdictional statement filed by the appellants. Professor Worley is a transportation expert and in his expert opinion, substantiated by many facts and figures, he demonstrated that the basic structure of the tax itself was discriminatory and arbitrary. This tax, the evidence showed, was so fundamentally unsound that it is excessive in the higher weight brackets by as much as 300% over the reasonable value of the privilege of using the highways. The statute is based on a ton mile theory, but the evidence discloses that the ton mile theory has never heretofore been used in the unorthodox manner in which it was used here. In every case of this type decided by this Court, commencing with the case of *Hendrick* v. *Maryland*, 235 U.S. 610, 35 S. Ct. 536, 59 L. Ed. 385, this Court has indicated that taxes of this

nature must be reasonable. At page 623 of the opinion in the *Hendrick* case, the Court said:

> "The amount of the charges and the method of collection are primarily for determination by the State itself; and *so long as they are reasonable and are fixed according to some uniform, fair, and practical standard*, they constitute no burden on interstate commerce." (Italics supplied)

See also *Interstate Transit* v. *Lindsey*, 283 U.S. 183, 51 S. Ct. 380, 75 L. Ed. 953, *Dixie Ohio Express Company* v. *State Rev. Comm.*, 306 U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495, *Aero Mayflower Transit Company* v. *Railroad Commissioners*, 332 U.S. 495, 68 S. Ct. 167, 92 L. Ed. 99, and *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 70 S. Ct. 806, 94 L. Ed. 1053 at page 1063.

We submit that the rule as laid down in *Hendrick* v. *Maryland*, *supra* has never been overruled by this Court, and we specifically contend and desire the opportunity to show the Court that in the case at bar the taxes established by the Illinois Legislature are in fact unreasonable and are not fixed according to any uniform, fair or practical standard, and that, therefore, they are a burden on interstate commerce. The purpose of this brief is solely to demonstrate that the Court should take jurisdiction of the case to decide the validity of a tax that "on its face appear(s) monstrous in amount". See *Capital Greyhound Lines* v. *Brice*, *supra*, page 1064.

The various cases cited by appellees lay down the rule that the legislature has discretion in establishing taxes of this nature and is not bound to scientific precision, and that as a practical matter, we must be content with rough approximation in considering the validity of taxes. We do not quarrel with this rule; however, we do submit that when expert testimony in the record before this Court demonstrates that in some classifications the tax imposed

by the Illinois legislature exceeds by as much as 300% the reasonable value of the privilege of using the highways, the Illinois legislature has gone beyond the limits of even rough approximation and has entered the realm of unreasonable and arbitrary taxation and has imposed a burden on interstate commerce.

III.

The 1951 Amendment to the Motor Vehicle Act of Illinois is confiscatory in violation of the XIV Amendment to the Constitution of the United States.

Although Rule 12, paragraph 3 of the Supreme Court of the United States allows the appellee to file a statement against the jurisdiction of this Court, and the said statement should, therefore, have been directed against the jurisdictional statement filed by the appellants, the appellees have seen fit to attempt, in their statement, to argue the merits of the errors assigned at Nos. 5 and 6 of Appellants' Assignment of Errors. We question that this is the time to argue the merits of the Federal questions involved in this case, but we cannot leave appellees' statement unchallenged. The evidence as to confiscation is clear. Appellees in their statement admit that the witnesses testified that the taxes imposed by the 1951 Act would exceed estimated future net profits calculated upon the basis of the then current transportation rates. In addition, the record discloses (Abst. 44, 84) that increases in rates will not be forthcoming because in interstate commerce the rates are controlled by the Interstate Commerce Commission on a competitive basis. Since competition on long hauls is with carriers from other states who are not affected by the Illinois Act, no general rate increase by the Commission would be likely, and on a short haul basis in interstate commerce, carriers simply share in the long

haul rate which pertains to the long haul carrier, who need not be and usually is not affected by the Illinois license fee.

Appellees in their statement emphasize that not one witness testified that the increased rates imposed by the 1951 Act would force his concern to go out of business. Actually, of course, we were not allowed to ask of the witnesses whether in their opinion they would be forced out of business, since Appellee objected to said question on the basis of its requiring a speculative answer. By the same token, it is an inescapable conclusion that if a license fee is charged which exceeds net profits, and if rates cannot be increased to increase those profits, the operations of the affected truckers necessarily would result in a loss. And it is further perfectly reasonable that where operations are conducted at a loss the only alternative is for the concern to go out of business. The record, therefore, which is uncontradicted by the appellees, clearly discloses that the tax imposed by the 1951 Act confiscates the businesses of the plaintiffs in this case. Since these plaintiffs are a representative cross-section of the entire trucking business in Illinois, both intrastate and interstate, the entire industry, or a large segment thereof, is confiscated by the operation of the Act contrary to the guaranties of the XIV amendment.

We suggest that the above consideration of the confiscation issue demonstrates conclusively that there is here presented a Federal question for consideration by the Court on its merits. However, the appellees continue in their statement by citing the case of *Magnano Company* v. *Hamilton*, 292 U.S. 40, 54 S. Ct. 599, 78 L. Ed. 1109, which we submit should have no place at this time in a consid-

eration of jurisdiction. In the portion of the *Magnano* case quoted by the appellees it is stated:

> "That clause (the XIV Amendment) is applicable to a taxing statute such as the one here assailed only if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

We have alleged, and here contend, that the 1951 amendment to the Motor Vehicle Act of the State of Illinois is in fact the exertion of such a power in that it confiscates a useful and legitimate business which the legislature of Illinois would have no power to prohibit in the interests of public health, safety and welfare under the police power. Although at the proper time we will brief this point at considerable length, suffice it now to point out to the Court that this Court and other Courts have held on numerous occasions that a legislature may not indirectly prohibit a legitimate business by taxation where such business may not be directly prohibited. For example, in the case of *Nichols* v. *Coolidge*, 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, where a portion of the Federal Estate Tax Law was held unconstitutional as violating the Fifth Amendment to the Constitution (since a Federal Statute and not a State Statute was involved), the Court said at page 542:

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

And again dealing with a Federal Statute and the Fifth Amendment, which is exactly comparable to a State Statute and the Fourteenth Amendment, this Court said in the case of *Tyler* v. *The United States*, 281 U.S. 497, 50 S. Ct. 356, 74 L. Ed. 991, at page 998:

> "The point made is that the tax is so arbitrary and capricious as to amount to confiscation, and, there-

fore, to result in a deprivation of property without due process of law * * * the possibility that a Federal Statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the Due Process Clause of the Fifth Amendment must be conceded."

Our contentions are clearly set forth in the case of *Fiscal Court of Owen County et al* v. *F. & A. Cox Company*, 132 Ky. 738, 117 S.W. 296, involving a graduated license tax on horse drawn vehicles, which was held invalid. The Kentucky Court says at page 298:

"It may be conceded that ordinarily the reasonableness of a license fee imposed as a tax is a question for its discretion. (citing cases). This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (citing cases). While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000, or imposing upon every merchant a license of $5,000, or upon every washerwoman a tax of $1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means

of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. (citing cases.)"

We suggest that the above cases completely answer appellees' contentions. Indeed, the *Magnano* case itself shows that this Court has jurisdiction to determine whether the tax here in question in substance and effect amounts to an exertion of forbidden power to confiscate property. Moreover, since the *Magnano* case involved a tax on a butter substitute, which tax in effect might well aid in protecting the public from unscrupulous dealers foisting the substitute on the consumer as genuine butter, it could well be said that the Court was there dealing with a situation where the legislature could legitimately prohibit a business in the interests of the public welfare, whereas no one has ever contended that the trucking business in any manner should be prohibited or could be under the police power. It involves no fraud; the trucking industry in fact is essential to provide the transportation necessary to maintain the present day economy. Its continued operation is imperative for the protection of the public health, safety and wel-

fare. It may not be prohibited directly under the police power, and therefore, under the *Magnano* case and under all the other cases cited it may not be confiscated indirectly by means of a tax.

We submit on the basis of the above that this Court has the right and the duty to accept jurisdiction and to determine whether in fact and in law the 1951 amendment to the Motor Vehicle Act of Illinois is confiscatory, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

IV.

The 1951 Amendment to the Illinois Motor Vehicle Act violates the Fourteenth Amendment to the Constitution of the United States by reason of vague, arbitrary and inconsistent provisions.

Appellees first point out that the indefinite agricultural exclusion has existed in the Motor Vehicle Law of Illinois in substantially its present form for over twenty years. We submit that simply because an unconstitutional provision has remained unchallenged for twenty years it is not made constitutional thereby. Furthermore, the long list of cases cited by appellees in their statement and motion relative to agricultural exemptions indicates beyond any doubt that the inclusion in the Statute of an agricultural exemption gives rise to a justiciable question, since, otherwise, all the cases cited by the appellees with reference to such exemptions could not have arisen. Obviously, none of the cases cited are controlling in the case at bar, since none of them is concerned with the particular agricultural exemption contained in the questioned Act, nor with an identical provision. Those affected by the Illinois Act are as entitled to have their day in Court on the question as those residents of other states who were parties in the cases cited. The mere

existence of the number of cases cited by appellees demonstrates, we submit, beyond doubt that the agricultural exemption contained in the Illinois Act is one to which these parties are entitled to a final judicial determination.

We also maintain that the lower tax rates provided for buses operating in a municipality or municipalities or within a "close radius thereof" is indefinite and constitutes a discrimination in favor of buses and against trucks which similarly operate. The words "close radius thereof" could mean many things to different people and are undefined in the statute. So, too, the entire tax is based on the weight of the vehicle with a "maximum load." This term is also undefined and could mean many things and could be defined only by an administrative officer exercising a legislative function. As demonstrated above, the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N.E. 2d 521, should not be deemed as conclusive, since it is now pending on appeal before this Court.

Therefore, we submit that because of the vague, indefinite and uncertain provisions, some of which we have herein mentioned, a question arises under the Fourteenth Amendment to the Constitution of the United States upon which this Court should pass.

CONCLUSION.

We again respectfully point out to the Court that the only question at issue at this time is the jurisdiction of this Court to hear and determine the Federal questions raised in this case now before the Court. We have not here attempted to discuss the merits any more than we were obliged to do so by the nature of the statement and motion made by the appellees. We do, however, submit that the case at bar is not controlled by the case of *Bode* v. *Barrett*, and that even if it were controlled by *Bode* v. *Barrett*, in view of the different issues involved in the two cases, and

since *Bode* v. *Barrett* is on appeal to this Court and as yet undecided, these appellants should have the opportunity of presenting their case to this Court along with the parties in the *Bode* case.

Moreover, the foregoing brief answers the points in appellees' motion. Other substantial questions involved are set forth in our jurisdictional statement. It would be difficult and inappropriate at this stage, without a printed record or even an unprinted record consecutively paged to which reference can be made, to elaborate our contentions. Further argument and analysis of the record properly await the hearing on the merits. The case is within the appellate jurisdiction of this Court. It presents substantial federal questions. Appellees' motion should be denied.

Respectfully submitted,

SAM ALSCHULER,
FRANK R. REID JR.,
Attorneys for Appellants.

SAM ALSCHULER,
FRANK R. REID JR.,
RALPH C. PUTNAM JR.,
WILLIAM C. MURPHY,
ROBERT B. HUPP,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
DEC 13 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Appeal From The Supreme Court of the State of Illinois.

BRIEF FOR CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois.
REID AND OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

INDEX TO THE SUBJECT MATTER.

	PAGE
Opinion and Report Below	1
Jurisdiction	1
Statement of the Case	3
Specification of Errors to be Urged	7
Summary of Argument	10
Argument:	
I. The 1951 amendment imposes an undue burden on interstate commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States.	16
A. The tax bears no reasonable relation to the privilege of using the highways of the State of Illinois.	16
B. The tax is excessive in amount.	38
II. The taxes imposed by the 1951 amendment are confiscatory and violate Section 1 of Amendment XIV to the Constitution of the United States.	46
III. The 1951 amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of the United States.	64
Conclusion	76

PAGE

Appendix A—An Act to Amend Sections 9, 11 (a) and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k) and 9 (l) of the 'Motor Vehicle Law', approved June 30, 1919 as amended. 77

Table of Cases.

Aero Mayflower Transit Co. v. Georgia Public Service Comm., 295 U.S. 285 ..... 20, 40

Aero Mayflower Transit Co. v. Board of Railroad Commrs., 332 U.S. 495 ..... 20, 40

Bode v. Barrett, 412 Ill. 204, 106 NE 2d 521 52

Bonsteel v. Allen, 83 Fla. 214, 91 So. 104 48

Capital Greyhound Lines v. Brice, 339 U.S. 542 ..... 18, 19, 20, 21, 22, 23, 37, 38, 41, 44, 45

Case-Fowler Lumber Company v. Winslett, 168 Ga. 808, 149 S.E. 211 75

Clark v. Gray, 306 U.S. 583 19

Clark v. Poor, 274 U.S. 554 ..... 39, 40

Co-Ordinated Transport, Inc. v. Barrett, 412 Ill. 321, 106 NE 2d 510 1

Continental Baking Co. v. Woodring, 286 U.S. 352 ..... 25, 69

Dane v. Jackson, 256 U.S. 589 46

Dixie Ohio Express Co. v. State Rev. Comm., 306 U.S. 72 40

Fiscal Court of Owen County v. F. & A. Cox Co., 132 Ky. 738, 117 S.W. 296 ..... 53, 59

Frost v. Corp. Comm. of Oklahoma, 278 U.S. 515 67

PAGE

Grennan v. Sheldon, 401 Ill. 351, 82 NE 2d 162 68

Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150 .....65, 69

Hendrick v. Maryland, 235 U.S. 610 .....39, 40, 43

Hicklin v. Coney, 290 U.S. 169 39

Ingels v. Morf, 300 U.S. 290 .....17, 19

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 40

Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 ....16, 36,39

Kane v. New Jersey, 242 U.S. 160 .....39, 40

Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699 48

McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 .....18, 20, 21, 36

Morton Salt Co. v. City of South Hutchinson, 159 F. 2d 897 48

Nichols v. Coolidge, 274 U.S. 531 56

Ohio Tax Cases, 232 U.S. 576 47

People v. Brown, 407 Ill. 565, 95 NE 2d 888 59

People v. Kastings, 307 Ill. 92, 138 NE 269 62

People v. Wilson, 249 Ill. 195, 94 NE 141 58

Price v. The People, 193 Ill. 114, 61 NE 844 58

Prouty v. Coyne, 55 F. 2d 289 .....17, 36, 41

Sprout v. South Bend, 277 U.S. 163 .....16,36, 39

State v. Kartus, 230 Ala. 352, 162 So. 533 47

State v. Lucas, 196 La. 299, 199 So. 126 55

Truax v. Corrigan, 257 U.S. 312 66

Tyler v. U.S., 281 U.S. 497 56

Union Brokerage Co. v. Jensen, 322 U.S. 202 44

PAGE

CONSTITUTION OF THE UNITED STATES.

Section 8 of Article I 16, 46

Section 1 of Amendment XIV 16, 46, 64, 65, 76

STATUTES.

Ill. Rev. Stats., 1951, Ch. 95½, Sec. 9 et seq 2

Title 28 U.S.C. Sec. 1257 (2) 2

OTHER CITATIONS.

33 Amer. Jur. 366 53

11 Amer. Jur. 1147 56

51 Amer. Jur. 98 61

37 C.J. 194 53

Eastman, Public Aids to Transportation, Vol. 4, P. 149 25

Griffenhagen & Associates, A Highway Improvement Program for Illinois, Nov. 1948 ..... 13, 44, 45

MacDonald, Hearings before Subcommittee of Senate Committee on Interstate and Foreign Commerce, pursuant to S. Res. 50, June 27, 1950, Part VII 27

St. Clair, Suggested Approaches to the Problems of Highway Taxation 26

Webb, Public Aids to Domestic Transportation, Board of Investigation and Research, P. 18 September 19, 1944, House Document No. 159 26

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Appeal From The Supreme Court of the State of Illinois.

BRIEF FOR CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS.

Opinion and Report Below.

The opinion of the Supreme Court of Illinois (R. 316-324) is reported in 412 Ill. 321, 106 NE 2d 510.

Jurisdiction.

On January 15, 1952 the Circuit Court of Kane County, Illinois entered a decree finding that an act of the General Assembly of the State of Illinois entitled "An Act to Amend

Sections 9, 11 (a) and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k) and 9 (l) of the 'Motor Vehicle Law,' approved June 30, 1919 as amended," (Ill. Rev. Stats. 1951, Chap. 95½, Sec. 9, et seq.) was repugnant to the Constitution of the United States, (R. 34).

Said decree was appealed to the Supreme Court of Illinois by the defendants.

On June 4, 1952 the Supreme Court of Illinois entered an order reversing and setting aside said decree and its decision was in favor of the validity and constitutionality of said statute. (R. 325)

On July 15, 1952 a petition for appeal was presented to the Honorable Sherman Minton, one of the Justices of this Court (R. 326), and on said date he entered an order allowing said appeal. (R. 332)

On October 13, 1952 an order was entered herein noting probable jurisdiction of the cause and transferring the cause to the summary docket. (R. 336)

The jurisdiction of this court is invoked under Sub-section (2) of Section 1257 of Title 28 of the United States Code.

STATEMENT OF THE CASE.

The 67th General Assembly of the State of Illinois passed an act approved by the Governor of Illinois on July 9, 1951 entitled "An Act to Amend Sections 9, 11 (a) and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k) and 9 (l) of the 'Motor Vehicle Law,' approved June 30, 1919 as amended," a copy of which act is attached hereto as Appendix "A".

Plaintiffs-appellants (hereinafter referred to as "appellants") most of whom were engaged in interstate commerce, filed a complaint in the Circuit Court of Kane County, Illinois, to enjoin the enforcement of said statute and to have said statute declared unconstitutional. (R. 1) The complaint charged that said statute was repugnant to and violated the provisions of Section 8 of Article I and Section 1 of Amendment XIV of the Constitution of the United States.

The defendants-appellees (hereinafter referred to as "appellees") filed an answer (R. 2) denying the allegations of the complaint, and evidence was introduced by both parties.

The issue in the case is the constitutionality of this 1951 amendment to the Motor Vehicle Law. Appellants' position is that the tax imposed by said act constitutes an undue burden upon interstate commerce and is a discrimination against interstate commerce and is greatly in excess of a fair contribution from the appellants, and all others in the same class, for the privilege enjoyed by them of using the highways of the State of Illinois and is in violation of the constitutional provisions referred to.

Appellants' further position is that the statute is confiscatory, arbitrary and void in violation of said constitutional provisions and that it denies to the appellants and

others similarly situated the equal protection of the laws in violation of said constitutional provisions.

The evidence consisted of testimony by numerous persons in the industry as to the effect of said act on the truck industry, the testimony of a truck expert, the testimony of bankers, the testimony of a transportation expert and the testimony of officials of the State of Illinois. The undisputed evidence showed that the truck license fees were tremendously increased. For example, under the old schedule a truck which paid $420.00 per year, under the new act will pay in 1954 a tax of $1588.00. The undisputed evidence showed that the taxes of one of the parties would be increased as much as 2000% (R. 54). Appellants also offered the testimony of Professor John S. Worley, a recognized leader in the field of highway engineering and administration, which revealed that the ton-mile theory as applied by the authors of this tax was so fundamentally unsound as to be excessive in some classifications by as much as 300% and patently arbitrary and discriminatory. (See Plaintiffs' Exhibit 16; R. 275; offered at R. 133). Throughout his analysis Professor Worley proceeded on the assumption that the total revenue sought under the 1951 Act was reasonably required to meet state highway needs (R. 127), and appellants did not question the estimate of needed revenue for road purposes which the state made. Appellants did, however, vigorously attack the formula upon which the registration fee schedule for raising the estimated required revenue was based.

Professor Worley testified that numerous items of highway cost have no relation to the weight of the vehicles passing over the highways. Costs such as grading, fencing, signs, signals, landscaping, roadside parks, right-of-way, diversion of funds to other uses than highway uses, are not affected by the weight of vehicles passing over state roads (R. 128). Other costs, on the other hand, are related wholly or partly to the vehicular weight of traffic

(R. 129). Under this common-sense distinction, some 60% of highway costs is not affected by weight, while 40% is (Plaintiffs' Exhibit 14; R. 271; offered at R. 133).

Appellees' witness did not deny that some highway costs were not affected by weight, but stated that they could not be accurately measured (R. 189). Appellees' exhibit 7 (R. 307; offered at R. 195) in support of the 1951 Act fee schedule shows that weight (expressed in terms of "ton-miles") was the criterion in distributing highway costs among the various classes of trucks. For comparison with appellees' exhibit 7, Professor Worley prepared six corresponding exhibits (appellants' exhibits 11-16, incl.) (R. 265-275; offered at R. 133) in which the various items of highway cost are broken down into those costs affected by weight and those not affected by weight; that portion of total highway costs affected by weight was then distributed back among the vehicle classifications on a ton-mile basis, and that portion not affected by weight was distributed back on a vehicle-mile basis. The resultant tax schedule appears in appellants' exhibit 15 (R. 273; offered at R. 207).

Seventeen truck operators testified that the tax increase would exceed their net profits for the year 1950 or would eliminate their profit to the extent that they could not make a fair return on their invested capital. These witnesses included every type of carrier: line haul, short haul, contract, local and private haulers, interstate, intrastate operators, and truck broker. These witnesses, moreover, were owners and operators of all types of equipment.

In addition, two officials of banks which heretofore had engaged heavily in truck financing testified that they had already substantially curtailed their truck loans because of the greatly increased tax and its consequent effect in making truckers unable to pay for their equipment. The appellees introduced no testimony to contradict or ques-

tion appellants' testimony as to the confiscatory effect of this Act on the truck industry in Illinois.

Appellees' testimony consisted primarily of the testimony of Mr. Frank N. Barker, Chief Highway Engineer of the State of Illinois, and the introduction of two exhibits which were prepared in his department under his supervision and direction.

Defendant's exhibit 7 (R. 307; offered at R. 195) showed the different classes of motor vehicles registered in 1949, the average miles travelled each year by each class of vehicle, the number of gallons of gasoline consumed by all vehicles, the number of gallons multiplied by a five cent gas tax rate, and the average weight of all vehicles.

From the above data was computed the ton-miles travelled annually by each class of vehicles, the motor fuel tax per ton-mile for each class (at a 5¢ rate), the 1949 license fee per ton-mile paid by each class, and the total fees per ton-mile paid by each class under the old motor vehicle act but with a motor fuel tax of 5¢ a gallon. Thereafter a computation was made of the additional fees per ton-mile which would be required to equalize the tax payments per ton-mile by trucks and busses with the tax payments per ton-mile made by passenger cars. These additional fees were added to the 1949 license fees for the various classifications and the total was called the "License Fee as Equalized" i.e., equalized to the ton-mile fee paid by passenger cars in 1949. These license fees last computed were shown to correspond almost exactly with the license fee schedule contained in the 1951 Act and Barker testified that they were the basis of the 1951 Act.

Witness Barker explained that this exhibit had been based on the ton-mile theory which he stated has general support among highway engineers and was considered a valid theory of cost allocation by the State Division of Highways. In the opinion of witness Barker, the theory

adopted in plaintiffs' Exhibits 11-16 (R. 265-275; offered at R. 133) was sound (R. 193), but it was his opinion that highway costs affected by weight and those costs not affected by weight cannot be accurately measured (R. 189).

Defendants' Exhibit 2a (R. 293; offered at R. 158) was introduced by appellees and showed an estimate made by the Illinois Division of Highways, of the State's needs to meet present and future deficiencies of the Illinois primary highway system for the ten-year period from 1951 to 1960. The amount stated was $1,151,041,232.00. Defendants' exhibit 2b (R. 294; offered at R. 158) was an estimate made by the State Division of Highways of the funds available with the challenged statute in force for State highway construction during that ten-year period. The amount was $676,961,887.00.

On January 15, 1952 the Circuit Court of Kane County, Illinois, entered a decree finding that said act violated said constitutional provisions and holding said act unconstitutional (R. 34).

The appellees appealed to the Supreme Court of Illinois and on June 4, 1952 that court reversed the order of the Circuit Court of Kane County, Illinois and held said act to be constitutional (R. 325).

Specifications of Errors to be Urged.

The Supreme Court of Illinois erred:

1. In holding that said statute does not impose an undue burden on interstate commerce, in violation of Section 8, Article I, and Section 1, Amendment XIV of the Constitution of the United States, and in holding that the amount of the tax is not in excess of the fair and reasonable compensation for the privilege of using the state highways.

2. In ignoring the evidence that approximately 60% of the cost of constructing and maintaining the high-

ways and regulating the traffic thereon was not attributable to the weight of vehicles passing over them, and that the licensing fee schedule in question, based solely on weight, resulted in a tax, insofar as the heavier vehicles were concerned, that was discriminatory, and greatly in excess of a fair or reasonable compensation for the use of the state roads. This violates Section 8 of Article I and Section 1, Amendment XIV of the Constitution of the United States.

3. In sustaining the validity of the statute imposing an annual tax as large in amount as the Illinois tax (maximum $1588.00) where the statute does not contain an alternative tax based on mileage actually traveled. This was contrary to Section 8 of Article I of the Constitution of the United States.

4. In holding that the constitutionality of a tax of this nature must be judged by its result, not its formula, and must stand unless the aggregate amount is shown to be in excess of fair compensation for the privilege of using state roads. This is error because it does not take into account the question of discrimination between different sizes of trucks and is contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

5. In holding that the taxes imposed by the amended act have a reasonable basis. This is in violation of Section 8 of Article I of the Constitution of the United States.

6. In holding that the state may impose a tax so great in amount as to put out of business and confiscate a lawful industry, contrary to Section 1 of Amendment XIV of the Constitution of the United States.

7. In ignoring the evidence that the tax imposed by the amending act was confiscatory as to whole segments of the truck industry. This was contrary to Section 1 of Amendment XIV of the Constitution of the United States.

8. In holding that the act does not tax the heavier and more efficient trucks in excess of fair or reasonable com-

pensation for the privilege of road use. This violates Section 8 of Article I of the Constitution of the United States.

9. In holding that the operation of the act was not discriminatory against the heavier and more efficient trucks and in favor of passenger cars and lighter vehicles. This violates Section 1 of Amendment XIV of the Constitution of the United States.

10. In holding that the said act did not contain numerous arbitrary, inconsistent, vague and uncertain classifications, in violation of Section 1, Amendment XIV of the Constitution of the United States.

11. In overruling the contention of the appellants that the operation of the act was discriminatory by reason of the fact that it was based on the then existing tax rate for passenger cars to which rate all other license fees were equalized. This holding is in violation of Section 8 of Article I and Section 1 of Amendment XIV of the Constitution of the United States.

12. In denying appellants' contentions that the operation of the law and the omission of classes of vehicles, the creation of a class operating in a municipality "or a close radius thereof"; without defining the terms, basing the tax on "maximum load", without defining the same, and the creation of other confusing and indefinite classifications constituted denial of due process and equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

13. In failing to hold the amendatory act unconstitutional and void, as contrary to the Fourteenth Amendment to the Constitution of the United States.

14. In failing to hold the amendatory act unconstitutional and void, as contrary to Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States.

SUMMARY OF ARGUMENT

I A

The 1951 Amendment imposes an undue burden on interstate commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States. The tax bears no reasonable relation to the privilege of using the highways of the state of Illinois.

This court has held in many cases that in order for a tax of this nature to be constitutional the tax formula must have a rational basis. The tax formula involved here does not have a rational basis because it is based on the premise that all highway costs are related to the weight of the vehicles passing over the highway. The tax schedule is founded upon weight and as the weight of the vehicle increases the tax increases.

No attempt was made to allocate the various items of highway costs between those costs affected by the weight of the vehicle passing over the highway and those costs which were not affected by weight. Many highway costs have nothing to do with the weight of the vehicle passing over the highway. Costs such as those for the installation and maintenance of traffic lights, for grading, fencing, signs and signals, culverts, landscaping, roadside parks, excavation and abutments, piers, right of way and diversion of funds have no relation whatsoever to the weight of vehicles passing over the highway. Other costs such as administrative expense, construction, maintenance, interest, are only partially affected by the weight of the vehicles passing over the highways. Even the Chief Highway Engineer of the State of Illinois admitted that this theory was sound but stated that it was not possible in his opinion to make an allocation between costs due to weight and costs not due to weight.

The following factors were not considered in framing this tax schedule:

1. Traffic density is a more influential factor in some of the important highway costs than has been the use of highways by a relatively small number of heavy vehicles.

2. Passenger vehicles contribute to the cost of construction by such factors as present day high rate of speed, need for improved safety control, convenience, and roadside developments.

3. Highway construction and maintenance are influenced by a number of weather and natural factors that have nothing to do whatsoever with the weight of the vehicle.

4. Vehicle size has some influence on highway widths, however, there are other influences on width such as speed, traffic density and driving habits.

5. A large part of maintenance costs is entirely independent of traffic.

6. Large vehicles create, to some extent, hazards and cause congestion, but passenger cars being so much greater in number contribute to these traffic problems to a much larger degree than do the large vehicles.

Professor Worley concluded that approximately 40% of all highway costs are due to weight and 60% are not due to weight.

The 1949 report of the Division of Highways of the State of Illinois sets forth the amounts spent for maintenance and operation for that year and sets forth the percentage that each item bore of the total cost. This corroborates the testimony of Professor Worley that 66.7% of costs of maintenance were not due to weight.

After making a conservative allocation of highway costs between that percentage affected by weight and that per-

centage not so affected, Professor Worley distributed back the portion of total highway costs attributable to weight among the various vehicle classifications on the ton-mile basis, and that portion of highway costs not attributed to weight was distributed back amongst the vehicle classification on the vehicle mile basis. These were added together, revealing the total contribution each vehicle should make to the total highway cost. The gasoline tax per vehicle was subtracted therefrom and the difference was determined to be the proper registration fee for such class of vehicle.

The tax under the 1951 act was based on the ton-mile theory. This theory purports to establish the cost of moving one ton one mile. It is misapplied here because, as stated above, many of the costs of constructing and maintaining highways are not related to the weight of the vehicle passing over the highway.

When the considered judgment of leading highway engineers is that a substantial percentage of highway costs have nothing to do with weight, a taxing theory which fails to take that fact into account, cannot be said to produce a tax schedule which bears a relation to the value of the use of the highways to the various classifications of vehicles.

While scientific accuracy is not essential in preparing a tax schedule such as this, a schedule which is founded upon a formula as faulty as the one involved in the 1951 Amendment, fails to show a reasonable relationship between the tax and the privilege of using the highway, and is unconstitutional. The taxes assesed in some instances are as much as 300% in excess of a fair and reasonable fee.

I B

The tax is excessive in amount. Neither this court nor any state appellate court has ever maintained any tax near-

ly as high as the tax involved here. In many cases this court has held that a tax of this nature must be reasonable in amount.

Under the tax schedule in question a single truck may have to pay in 1954 an annual tax of $1,588.00. Many of the plaintiffs will be subjected to new annual taxes or fees in an amount in excess of the net income they realized in 1950. In one instance this increase will be an increase of over 2000% in the amount of the tax to be paid. The optional provision for basing the tax on the miles actually traveled has been eliminated so that these huge taxes are assessed against the owners of vehicles who may drive them only a few miles over Illinois highways per year.

Griffenhagen and Associates is an engineering firm that was employed by the Highway Department of the State of Illinois. They conducted a very extensive survey extending over a period of two years and recommended a schedule of taxes to be adopted. Under the Griffenhagen recommendation the schedule of fees to be paid by trucks was increased but the Illinois legislature completely disregarded the Griffenhagen recommendations and enacted a bill which in some instances doubled the fees recommended. Such a tax is excessive in amount and imposes an undue burden on interstate commerce in violation of Section 8, Chapter 1 and Section 1, Amendment 14 of the Constitution of the United States.

II.

The undisputed evidence discloses that every trucker who testified in this case will be obliged under the 1951 amendment to the Illinois Motor Vehicle Act to pay annually in license fees more than his 1950 net income, or so much that the remaining net income would not produce a fair return on the capital invested in the witnesses' businesses, and that these increased fees cannot be passed

on to their customers. Since these witnesses constituted every type of truck operator, the testimony is indicative of the effect of the tax schedule on the entire truck industry in Illinois. The Courts have uniformly held that taxes which confiscate legitimate useful businesses violate the equal protection and due process clauses of the Fourteenth Amendment. Moreover, even if it might be argued that the Illinois Act is regulatory as opposed to revenue producing it has been held that a legislature, under the guise of taxation, may not prohibit a useful business that it cannot prohibit directly. Therefore, it follows that since the tax confiscates all, or a large segment of the trucking industry in Illinois, and since this industry is useful and, indeed, necessary to our economy, the tax levied deprives the truck owners of their right to earn a living in a legitimate business and thus deprives them of their liberty and their right to enjoy life and to acquire property contrary to the guarantees of the Fourteenth Amendment.

III.

The 1951 amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of the United States. This court has frequently held that although the legislature has power to classify, such classification cannot be arbitrary or without rational basis. There must be reasonable basis for differentiation and that differentiation must serve the purposes of the statute. The classifications in the schedule are inconsistent and lack uniformity. As pointed out heretofore the schedule is based solely on weight. Yet under the classifications involved, in some instances, the owners of heavier vehicles pay less than the owners of lighter weight vehicles, and vehicles of a given weight having fewer wheels pay less than the owners of vehicles of the same weight having more wheels. The testimony was undisputed that the greater the number of

wheels on a vehicle, the more the load is distributed on the highway, and the less damage will be done to the highway.

The act discriminates against trucks in favor of busses used for transporting more than seven passengers entirely within the territorial limits of a single municipality, or a single municipality and municipalities contiguous thereto or a close radius thereof, and equipped with hydraulic shock absorbers and whose rates are subject to the Illinois Commerce Commission. Numerous witnesses testified that their trucks operated entirely within the territorial limits of a single municipality and that some or all of their trucks were equipped with hydraulic shock absorbers. They testified that they operate each such truck from three thousand to ten thousand miles per year. The evidence showed that the average bus travels well in excess of thirty thousand miles a year. Although the bus makes much greater use of the highway than do such trucks, such trucks pay a fee many times that of a bus of the same gross weight.

The terms "maximum load" and "gross weight" which are the basis for the license fees are capable of many interpretations and are vague and uncertain.

The term "like exemptions and privileges" is vague and uncertain. The terms, municipality and "a close radius thereof" and "agricultural pursuits" are vague, indefinite and uncertain and offer no basis for a reasonable classification and result in unconstitutional discrimination.

ARGUMENT.

I.

The 1951 amendment imposes an undue burden on Interstate Commerce in violation of Section 8, Article I and Section 1, Amendment XIV of the Constitution of the United States.

A.

The tax bears no reasonable relation to the privilege of using the highways of the State of Illinois.

Section 8, Article I, U.S. Constitution provides:

> "The congress shall have power . . . to regulate commerce with foreign nations and among the several states . . ."

Section 1, Amendment XIV, U. S. Constitution provides:

> " . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

This court has decided many times that a tax of this character is unconstitutional if it bears no reasonable relation to the privilege of using the highway.

In *Sprout* v. *South Bend*, 277 U.S. 163, a tax on busses based on seating capacity was held invalid, Mr. Justice Brandeis stating at p. 170:

> "A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

In *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, a tax on busses based on earning capacity was held to violate the

commerce clause of the Federal Constitution, and to be invalid, Mr. Justice Brandeis stating at p. 190:

> "Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. *Clark* v. *Poor*, 274 U.S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory."

In *Ingels* v. *Morf*, 300 US 290, this court held a "caravan" tax of $15.00 levied by the State of California to be unconstitutional where the evidence showed that the cost of regulation was $5.00, stating on p. 297:

> "The administrative expense of issuing the permits appears not to have been included, but the testimony that that expense was about $5.00 per car does not bridge the arithmetical gap, and does not impeach the court's conclusion that the permit fee bears no reasonable relation to the total cost of regulation, to defray which it is collected. It rightly held that the licensing provisions of the statute impose an unconstitutional burden on interstate commerce."

In *Prouty* v. *Coyne*, 55 F 2d 289, the court held the South Dakota license fee invalid as to interstate carriers which was based on the greater of manufacturer's weight of chassis or actual chassis weight, because it did not de-

pend on mileage traveled or tonnage carried. The court stated on p. 293:

> "In the instant case, it appears from the face of the act that the avowed purpose of the tax was for compensation for the use of the highways. This being true, the burden of proof was upon the plaintiffs to show that the tax bears no reasonable relation to the privilege of using the highways, or is unreasonably discriminatory. To sustain the act as a burden on interstate commerce, three things must appear: First, that the tax was levied only for compensation for the use of the highways; second, that the tax as levied bears a reasonable relation to the privilege of using the highways; and, third, that it is not unreasonably discriminatory."

In *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, a tax was levied on all gasoline over 20 gallons carried in tanks of motor vehicles into the state of Arkansas. This court held this tax to be unconstitutional on the ground that this formula bore no reasonable relation to road use. The court stated at p. 181:

> "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made."

Appellees contended below that the recent case of *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, establishes the proposition that whether a tax is constitutional or not must be judged by its result, not its formula, despite a long line of authority to the contrary. We do not believe that any such unqualified proposition is found in the *Brice* case. The *Brice* case on its facts was unique in several respects. It involved a Maryland titling tax of 2% upon the fair market value of vehicles used in interstate and intrastate commerce. Compare this tax with the Illinois Tax. Suppose the 59,000 pound truck is worth $10,000. Under the Maryland Act the tax would be 2% of $10,000, or $200, while under

the Illinois law the tax is $1,588. annually. The Maryland tax was not imposed annually or periodically but only at the issuance of the original and each subsequent certificate of title. If the Illinois tax were only as oppressive as the Maryland tax, we would not be before this court.

The interstate carriers challenging the act in the *Brice* case did not attack it on the ground that the amount of the tax was in excess of fair compensation for the privilege of road use. Appellants here do so challenge the Illinois Act (see Argument IB). The challenge in the *Brice* case was levelled at the formula alone. The situation in the *Brice* case is further rendered unique in that Maryland also charged mileage tax for the privilege of road use.

That the majority opinion in the *Brice* case did not mean to overthrow the solid line of cases requiring not only that the tax exaction be related to the value of the privilege of road use, but also that it have a rational basis, is evident from the citation of two of those cases in the majority opinion. Cited in the opinion was *Clark* v. *Gray,* 306 U.S. 583, in which case the court upheld the California caravan act of 1937, imposing two license fees, each of $7.50, for six months permit for caravaning a car driven into that State; the court there found that the tax was not "without rational basis" or excessive. Also cited in the *Brice* case was *Ingels* v. *Morf,* supra, wherein a previous California caravan tax of $15 per car was held unconstitutional where the evidence showed that the attendant cost to the state was only $5 per vehicle.

It is again worth noting that these and the other leading cases cited in the *Brice* case involved fees and taxes which the court was careful to describe as "moderate," "reasonable" and which in many instances were but nominal charges.

The *Brice* case cannot properly be construed to hold that the sole test of constitutionality is the aggregate amount of

tax collected, entirely divorced from the tax formula. To so hold would be to logically conclude that any taxing scheme is constitutional which yields no more than the sum desired by the taxing state for road purposes; in that event, no motor vehicle tax is attackable except by proof that the tax will yield more revenue than the State estimates that it should have at its disposal. The State might include within its estimate any number of projects and it would not be possible for a taxpayer to say that the projects were not necessary or desirable.

To judge constitutionality strictly in terms of result without regard to formula, is to say that a passenger car may be charged a registration fee ten, or even a hundred, times as much as that charged a 40,000 pound truck. Carried to its logical conclusion, any such proposition would validate a taxing scheme that imposed the entire tax burden on trucks weighing, say, 3,000 to 8,000 pounds and permitting all other vehicles to be tax-exempt. Certainly nothing in *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U.S. 285, or *Aero Mayflower Transit Co.* v. *Board of Railroad Commrs.*, 332 U.S. 495, or *Capital Greyhound Lines* v. *Brice*, (*supra*), supports the proposition that the tax formula may be unreasonable, discriminatory, arbitrary or capricious. The *Lindsey* case specifically holds that the tax must not be discriminatory if it is to be constitutional.

The case of *McCarroll* v. *Dixie Greyhound Lines, Inc.*, (supra) is one in which a vehicle tax was invalidated *for the very reason that the tax formula was without rational basis.*[1] The statute was held unconstitutional simply because the standard of measurement of the tax was found to be unrelated to what the State gave; gasoline in the tank of an entering vehicle can have no relation to a fair charge for the privilege of road use. The Arkansas tax was declared to be imposed upon the privilege of highway use and

[1] Italics ours throughout, unless otherwise indicated.

the proceeds were allocated to that purpose. There was no showing that the State was collecting sums in excess of its needs or that the carrier was being subjected to severe economic strain. The defect lay in the arbitrary and unreasonably discriminatory tax formula. The majority opinion quoted with approval the following language from the opinion of the Circuit Court of Appeals below (p. 179):

> "If it is to be sustained at all with respect to gasoline to be used in other states, it must be sustained upon the theory that the *method employed for determining the amount of the tax* constitutes a *fair measure* for ascertaining the compensation which lawfully may be exacted by Arkansas from the appellant for the use which it makes of the highways of the State . . . ".
>
> "While we can understand how the use of state highways by a carrier can be roughly measured by the amount of gasoline which that carrier uses to move its vehicles over the highways, we are unable to comprehend how the use of the highways of one state can appropriately be measured by the amount of gasoline carried in the fuel tank of an interstate carrier for use upon the highways of another state."

The *McCarroll* case was decided in 1940. The *Brice* case was decided in 1950, only *ten* years later. Surely the court had the *McCarroll* case in mind at the time it decided the *Brice* case, and if it had been the intention of the court to overrule the *McCarroll* case the court would have done so expressly. Not having done so, we believe the *McCarroll* case as well as the other cases which preceded it still stand, and it is still the rule that the tax formula must have a rational basis.

Throughout the opinion in the *Brice* case the Court points out that it is relying on prior decisions and adhering to existing rules. In the past, taxes on occasion have been challenged on the basis of their formula alone, and not on the basis of the result. It seems obvious that if a legislature devised a tax schedule based on an improper formula,

or, indeed, based on no formula at all, and that schedule did in fact by chance bear a reasonable relationship to the value of the privilege granted, that tax would be every bit as valid as one based on a reasonable, logical and valid formula. Conversely, if a legislature worked out a complete formula, and produced a tax schedule which bore no relation to the privilege granted, because the formula was improper or was misapplied, that tax schedule should be held invalid. This, we submit, is the situation that exists in the case at bar. Mr. Frank N. Barker, Chief Highway Engineer of the State of Illinois, testified as to the formula used. The testimony of Professor Worley was introduced to demonstrate how palpably improper the result produced by that formula was because the formula was based on weight, and erroneously included many items of cost not related to weight. As the Court said in the *Brice* case at p. 547:

> "Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied."

In the trial court the appellees objected to Professor Worley's testimony of the theory that only the legislature had authority to devise the taxing formula, and that at most Professor Worley was suggesting that some other formula might have been used. We submit, however, that Professor Worley's testimony was offered not as a substitute formula for the legislature, but to demonstrate how the formula was misapplied, and as a competent yardstick for the Court to use in determining whether the result was proper, and bore relation to the value of the privilege granted. In the *Brice* case the Court has clearly stated that the Court will determine whether the resulting tax schedule bears a reasonable relationship to the value of the privilege granted without regard to the formula used by the legislature in arriving at that result. Expert testimony, such as that of Professor Worley and such as the authorities cited by him,

which indicate to the Court a reasonable basis of determining the value of the privilege and thus enable the Court to determine whether the resulting tax schedule roughly approximates the value of the privilege, are certainly the "proper proof" to which the Court referred in the *Brice* case. The mere fact that the State Legislature based its tax on a formula is not enough to sustain the tax. We submit that Professor Worley's analysis demonstrates conclusively that the result, the tax schedule, bears no relationship to the value of the privilege granted, being in some classifications as much as 300% excessive, and that following the authority of the *Brice* case and all of the other cases decided, this tax must be held unconstitutional on the basis of its improper result.

The facts herein show that there is no reasonable relation between the Illinois tax and the privilege of using the Illinois highways.

It is apparent from a glance at the tax schedule that the tax greatly increases as the weight of the vehicle increases. The schedule is founded upon weight. Yet it will be clearly demonstrated that there are many factors that have no relation to weight included in the formula.

Professor John S. Worley appeared as a witness for the appellants. He stated that he was Emeritus Professor of Transportation Engineering at the University of Michigan, that he was head of the Transportation Department of the University of Michigan from 1922 until 1947, and had been actively engaged in engineering work in connection with transportation problems for the past thirty years. He testified at considerable length concerning the basis of the 1951 Amendment and defendants' exhibits in support thereof. Professor Worley testified also with reference to six exhibits which he had prepared (plaintiffs' exhibits 11 through 16 incl., R. 265-275; offered at R. 133) which were based for the most part on the same data as in defendants' exhibit 7 (R. 307; offered at R. 195) and for purposes of

comparison were prepared to correspond in form with defendants' exhibit 7. (Defendants' exhibit 7 is the same document, with minor corrections, as plaintiffs' exhibit 17 which is referred to in the record but which was not offered in evidence. R. 188. Throughout this brief this document is referred to as defendants' exhibit 7.).

It is commonly recognized and not disputed in this case that motor vehicles in Illinois, as in many states, pay for the use of the highways in two ways: one, by the payment of a vehicle registration fee, and two by the payment of a gasoline tax.

The testimony of Mr. Frank N. Barker, Chief Highway Engineer of the State of Illinois and a witness for the defendants, was that the tax imposed by the 1951 Act was based on the "ton-mile" theory (R. 186). He pointed out that the ton-mile fee paid by passenger cars in 1949, with a 5¢ motor fuel tax, was used as the standard ton-mile fee in computing the registration fees trucks should pay under the Act in 1952 and in 1954 (R. 186); the registration fees for all classifications of trucks were computed on that basis.

Thus, the authors of the 1951 Act, in devising the tax schedule contained in that statute, started with the assumption that the registration fee presently paid by passenger car owners was proper—proper not only for passenger cars now and in 1954, but proper as the standard ton-mile fee for all trucks. *We use the word "assumption" because defendants introduced no testimony to show that this premise was anything more than an assumption.* On redirect examination Professor Worley testified that the authors of the 1951 tax schedule used the ton-mile basis so that the fees to be paid were equalized to the highest cost per ton mile, i.e., equalized to the ton-mile cost of the passenger car (R. 151). It is clear that, from the standpoint of cost of carrying weight or tonnage over the highways, the passenger car is the costliest and, hence, the least efficient vehicle to operate because the passenger car is built for comfort and

not for carrying freight. Yet, the ton-mile rate of the passenger car was the standard to which all truck registration fees were equalized.

We realize that in *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, this court approved a tax based on ton miles. In that case the tax was based on miles actually traveled and the tax was not attacked on the ground that the amount was unreasonable. In this case the tax is assessed regardless of the miles traveled, and the tax is attacked on the ground that it is excessive in amount. Moreover we are concerned in this case with the way that the ton-mile theory was used in the compilation of this tax schedule, and not with the ton-mile theory generally.

Professor Worley stated that in all his experience he had never known the ton-mile theory to be used as it was used in the preparation of this tax schedule (R. 144). He stated that it was an improper use of the ton-mile theory and investigation of the authorities reveals that this use of the ton-mile theory as a basis for the distribution of the tax amongst highway users has been rejected by prominent tax experts.

Federal Coordinator Joseph B. Eastman, in his report titled "Public Aids to Transportation," (1940), Volume 4, page 149, concluded:

> "On the other hand, the 'gross ton-mile (percent of total)' index used in the 'railroad report' assumes that responsibility for wear and tear is in proportion to the product of gross weight and annual mileage. Since both factors generally increase together, the result is a progressively greater charge against the heavier vehicle. It is felt that such a charge bears little relation to responsibility for maintenance costs. . . .
>
> "The principal merit in basis F (*i.e.*, annual total gross ton-mileage), but one which does not suffice to commend it for use, is its ease of computation. This method gives results which in their general relative

trend and range are quite similar to those found in the railroad report (bases B and C). The complexity of the field of highway costs in itself precludes the possibility of allocating all elements of cost on a single basis. *Also, there is no evidence which convincingly indicates that for every element of cost the charge should progress upwards as weight and mileage of vehicles increase.*"

Mr. R. E. Webb, Chairman of the Board of Investigation and Research, in a report titled "Public Aids to Domestic Transportation," Board of Investigation and Research, page 18, September 19, 1944, House Document No. 159 made the following statement concerning the ton-mile approach to distribution of highway user tax responsibility:

"Although the gross ton-mile approach has (been) the virtue of simplicity, it is not a precise measure of special costs, since 10 automobiles will occupy a great deal more space and will be responsible for more wear than 1 truck with properly distributed wheel load of the same gross total weight. The gross ton-mile unit also tends in the direction of compensation for differential costs, but does so very inaccurately, since (1) wheel load rather than gross load is the major element to be considered in estimating the relative thickness of surface required for vehicles of different size; (2) neither required thickness nor required cost of service varies directly with the load factor; and (3) other added costs are related only vaguely, if at all, to gross weight."

Mr. G. P. St. Clair, of the Bureau of Public Roads, in his "Suggested Approaches to the Problems of Highway Taxation," says:

"The discussion of the gross ton-mile theory given in the preceding section has brought out the fact that gross ton-miles, offered as a measure of the service derived from highway use, is an inadequate measure of such value, and is likely to result in the imposition of excessive taxation upon heavy-weight vehicles."

Commissioner Thomas H. MacDonald of the Bureau of Public Roads in a statement presented in hearings before the Subcommittee of the Senate Committee on Interstate and Foreign Commerce pursuant to S. Res. 50, June 27, 1950, Part VII, stated as follows:

> "The use of gross ton-miles *alone* as a measure of road user tax responsibility is not recommended. There can be no pretense that the gross ton-mile analysis produces an accurate appraisal of the (highway costs) occasioned by vehicles of different sizes and weights."

This ton-mile theory is not an accurate measure of the extent of the use of the highway by motor vehicles.

One truck measuring the maximum distance permitted in Illinois, having a gross weight of 35,000 pounds will occupy only 45 feet of highway space, (Ill. Rev. Stat. 1951, Chap. 95½ P. 224) whereas, it would take 10 automobiles to equal the same gross weight, but such 10 automobiles would occupy 180 feet of highway space.

There is no affirmative proof showing that it costs more to provide highway space of 45 feet under specifications necessary for truck travel than the amount that would be required to build 180 feet of highway space necessary to the present day travel of our heavier and faster automobiles.

The following facts which appear in the testimony of Professor Worley and Mr. Barker have not been considered by the advocates of this 'ton-mile tax theory'.

1. Traffic density is a more influential factor in some of the important highway costs than has been the use of highways by a relatively small number of heavy vehicles (R. 202).

2. Passenger vehicles contribute to the cost of construction by such factors as present day high rate of speed, need

for improved safety control, convenience, and road side developments (R. 193).

3. Highway construction and maintenance are influenced by a number of weather and natural factors that have nothing to do whatsoever with vehicle characteristics (R. 193).

4. Vehicle size has some influence on highway widths, however, there are other influences on width such as the speed, traffic density and driving habits (R. 193; 202).

5. A large part of maintenance cost is entirely independent of traffic (R. 131; 141; 202).

6. Large vehicles create, to some extent, hazards and cause congestion, but passenger cars being so much greater in number contribute to these traffic problems to a much larger degree than do the large vehicles (R. 202).

One passenger car at the present Illinois license fees and motor fuel taxes at the 5¢ rate, can utilize the highways for Fifty-one (51) years or the equivalent of two times the normal average life of our Illinois Highways for the same amount of fees and fuel taxes that the state advocates for the operation of one class "P" truck for one year.

The passenger car being operated for Fifty-one (51) years, based on the averages shown in defendants' exhibit 7 will travel 471,750 miles, while the truck will travel only 36,500 miles. While trucks weigh more and should pay a larger tax than passenger cars, they should not pay ten times as much to go one-tenth as far.

The testimony of Professor Worley was uncontroverted that the theory employed by the draftsmen of the tax schedule in the 1951 Act was this ton-mile theory (R. 144) and that no attempt was made to allocate the various items of highway cost between those costs affected by the weight

of the vehicle passing over the highway and those costs which are not affected by weight. (Defendants' exhibit 7; R. 307; offered at R. 195). Mr. Barker did not deny this. Professor Worley testified that certain highway costs have nothing to do with the weight of the vehicles that pass over the highway (R. 127).

An example of this is the cost of installing and maintaining a traffic control signal. Let us assume that there is a stop and go light installed at an intersection and that a truck weighing 59,000 pounds, a passenger car weighing 2,000 pounds, and a motorcycle weighing 200 pounds approach the light and stop. The light changes from red to green, and the traffic goes on. It is apparent that the cost of installing and maintaining this traffic light is not connected in any way with the weight of the vehicles passing by it. It costs just as much to install and maintain this light for traffic consisting solely of light weight vehicles such as motorcycles and passenger cars as for heavy trucks. Other examples of highway costs which are similarly not related to weight are:

Grading
Fencing
Signs and signals
Culverts
Landscaping
Roadside parks
Excavation and abutments
Piers
Right-of-way
Diversion of funds

Professor Worley further stated that certain other items of highway cost are only partially affected by the weight of vehicles: administration expenses, construction, maintenance, interest (R. 128). Plaintiffs' exhibit 14 (R. 271; offered at R. 133) sets forth an allocation of highway costs

between those affected by vehicular weight and those not affected by weight. That exhibit represents the considered judgment of the witness and of other recognized authorities in the field of highway engineering (R. 141). Following is a summary of plaintiffs' exhibit 14 and Professor Worley's testimony concerning the proper distribution of highway costs as between those affected by weight and those not affected by weight:

Item of Highway Cost	Percent of Total Highway Cost	Percent Due to Weight	Percent Not Due to Weight
Construction	36.3	60.0	40.0
Right-of way	1.7	0.0	100.0
Equipment, etc.	4.1	0.0	100.0
Administration	10.3	33.3	66.7
Diversion	5.5	0.0	100.0
Interest	7.8	60.0	40.0
Other	7.2	0.0	100.0
Maintenance	27.1	33.3	66.7
	100.0		

By dividing the actual costs into the above percentages, Professor Worley concluded that approximately 40% of all highway costs are due to weight and 60% are not due to weight.

Mr. Barker, Chief Highway Engineer for the State of Illinois, testified that he considered this allocation theory sound (R. 193), but stated that in his opinion it was not possible to make an allocation between costs due to weight and costs not due to weight (R. 193).

Mr. Barker admitted that certain items of cost are not affected by weight; amongst others he noted cutting and clearing vegetation, removing dirt and debris, roadside planting, traffic signs, electric lighting, center line painting (R. 203, 204). Thus, even Mr. Barker, Chief Highway Engineer and principal witness for the State, concedes that the theory advanced by the plaintiffs in this case is sound (R. 193).

Plaintiff's exhibit 21a (R. 285; offered at R. 205) is a page taken from the 32nd Annual Report of the Division of Highways of the State of Illinois for 1949. The exhibit is not reproduced below in full but the part that is shows the cost of maintaining and operating the highways in the State of Illinois in 1949, and is as follows:

Class of Work	Total	1949 Costs Percentage of Total
Maintenance:		
Wearing surface	$ 4,232,943.02	31.52
Shoulders, ditches, cuts, and fills	2,430,157.14	18.10
Fixed large bridges (100-ft. length and over)	110,616.11	.82
Culverts and other drainage facilities	145,503.80	1.08
Small bridges (less than 100 ft. length)	27,675.66	.21
Movable span bridges	1,524.73	.01
Miscellaneous structures and facilities	25,151.93	.19
Total maintenance	$ 6,973,572.39	51.93
Operation:		
Cutting and clearing vegetation	$ 1,881,092.93	14.01
Snow removal and ice control	2,080,265.35	15.49
Clearing dirt and debris	1,100,773.62	8.20
Upkeep of markers and safety signs	656,151.35	4.89
Roadside planting maintenance	187,901.18	1.40
Upkeep of guardfence	171,648.41	1.28
Centerline marking	202,752.72	1.51
Upkeep and operation of traffic signals	102,398.65	.76
Traffic survey	166.04	.00
Subway and drainage pumping	37,905.35	.28
Electric lighting	27,072.53	.20
No-passing zone marking	7,103.05	.05
Total operation	$ 6,455,231.18	48.07
Total highway maintenance and operations	$ 13,428,903.57	100.00

We submit that the following argument shows that the state's own figures support Professor Worley's allocation of costs between factors due to weight, and those not due to weight.

Professor Worley set forth in his Table IV, (Plaintiffs Ex. 14 R. 271; offered at R. 133) that 66.7% of costs of maintenance were not due to weight. This "maintenance" figure covers the items shown above as maintenance and operation. Let us look at the items shown in the Report of the Division of Highways (plaintiffs' exhibit 21a). The first item that appears is "wearing surface". Although we do not believe it is strictly accurate, we will assume for the purposes of this argument that the maintenance of the wearing surface is due entirely to weight, but we submit that the following classes of work have no relationship whatsoever to the weight of the vehicle passing over the highway, and the following table shows the per cent those items comprise of total highway costs in 1949 as shown in the Annual Report of the Division of Highways referred to above.

Class of Work	Per Cent of Total Costs
Shoulders, ditches, cuts and fills	18.10
Culverts and other drainage facilities	1.08
Cutting and clearing vegetation	14.01
Snow removal and ice control	15.49
Clearing dirt and debris	8.20
Upkeep of markers and safety signs	4.89
Roadside planting maintenance	1.40
Upkeep of guardfence	1.28
Center line markings	1.51
Upkeep and operation of traffic signals	.76
Electric lighting	.20
No-passing zone markings	.05
	66.97

The court will observe that these items not due to weight total 66.97% of the total amount spent by the state in 1949 for maintenance and operating costs. Note how similar this is to Professor Worley's Table IV (Plaintiffs' exhibit 14 R. 271; offered at R. 133) in which he states these costs to be 66.7%.

Professor Worley divides the administration cost on the same basis as these maintenance costs above, because he stated that administration is concerned largely with maintenance although he stated many people believe that no effect should be given to weight in the allocation of administration costs, and it should be charged 100% to "not due to weight" (R. 130).

He states that no part of the right-of-way and equipment costs should be charged to weight (R. 130). We submit that the cost of acquiring the land for the right of way and the equipment used in the maintenance of the highway do not depend on the weight of the vehicles passing over the highway.

The other major item in the schedule is that of construction. Professor Worley divided this 60% due to weight and 40% not due to weight (R. 128). In setting this ratio, he took into account the fact that included in construction cost are costs for constructing signs and signals, culverts, landscaping, roadside parks, excavations, abutments and piers, as set forth above. Many of these same items are not properly allocable to weight for the purpose of maintenance and so should not be for the purpose of construction (R. 129).

Explaining application of the allocation principle outlined hereinabove, Professor Worley referred his testimony directly to plaintiffs' exhibits 11-16 (R. 265-275 incl.; offered at R. 133) which he prepared. After making a conservative allocation of highway costs between that percentage affected by weight and that percentage not so affected (plaintiffs' exhibit 14, R. 271), the portion of total highway costs attributable to weight was distributed back among the various vehicle classifications on the ton-mile basis, and that portion of highways costs not attributable to weight was distributed back among the vehicle classifica-

tions on a vehicle-mile basis (plaintiffs' exhibit 15, R. 273; offered at R. 133). These were added together revealing the total contribution each vehicle should make to the total highway costs. As explained above, since each vehicle pays part of the costs in the payment of the gas tax, the gas tax per vehicle was subtracted therefrom, and the difference was determined to be the proper registration fee for each class of vehicle.

The ton-mile rate used in so doing was not the ton-mile rate of the passenger car, or any favored class of vehicles, but an average ton-mile rate for all vehicles. Under the resulting tax schedule (plaintiffs' exhibit 15; R. 273) each vehicle bears its proportionate share of highway costs; each vehicle paying for that portion of highway cost unrelated to weight according to the mileage traveled by that class of vehicle, and each vehicle paying for the portion of highway cost related to weight according to its weight and the mileage traveled by that class of vehicle.

Mr. Barker, testifying on behalf of the defendants, agreed that there were certain items of highway cost unrelated to weight, but stated that in his opinion an allocation could not be made without making "innumerable assumptions" (R. 202). As has already been pointed out, the authors of the 1951 Amendment made such assumptions. They assumed as one of the basic premises of their registration fee schedule that the license fee now paid by passenger cars was proper, and that all trucks should be made to pay licenses on the same basis as the least efficient vehicle operating on state roads i.e. the passenger car. They ignored the obvious fact that a substantial portion of highway cost has nothing to do with weight. The motorcycle, the automobile, and the 59,000 pound truck derive equal benefit from a stop and go light, assuming that their mileage is the same. This example can be multiplied a hundred

times. It was the considered judgment of Professor Worley that 60% of highway costs have nothing to do with weight (R. 128). In support thereof he cited several recognized authorities: *Bader and Downs* (R. 129), a study by the Illinois State Highway Department made in 1938 (R. 129), Mr. Joseph Eastman of the Interstate Commerce Commission (R. 131), the Griffenhagen report on Illinois (R. 131), and the United States Board of Investigation and Research (R. 131). The Chief Highway Engineer for the State of Illinois, conceded that many highway costs are unrelated to weight (R. 203).

When the considered judgment of leading highway engineers is that a substantial percentage of highway costs had nothing to do with weight, a taxing theory which fails to take that fact into account cannot be said to produce a tax schedule which bears any relation to the value of the use of the highways to the various classifications of vehicles. The tax schedule contained in the 1951 Amendment was based, according to the testimony of the Chief Highway Engineer of the State, on the ton-mile theory, and as such failed to recognize that any highway costs are unrelated to weight (R. 201). Such a schedule necessarily must discriminate against the heavier and more efficient vehicles in favor of passenger cars and lighter vehicles, and a reference to plaintiffs' exhibit 16 (R. 275) will bear out this fact.

We are aware that scientific accuracy is not essential in preparing a tax schedule such as this, and we do not contend that Professor Worley's is the only schedule that should be adopted, but when the tax schedule is founded upon weight and when the undisputed evidence reveals that certain costs are not related to weight, the tax bears no reasonable relation to the privilege of using the highway and it should be declared unconstitutional.

In this case we are not concerned with the ton-mile theory generally but the application of the ton-mile theory as it was applied here. Professor Worley and Mr. Barker both testified that the use of the ton-mile theory was controversial and it may be claimed that since the basis of the tax schedule is controversial this court will not say that it is unconstitutional when there are arguments to be made on both sides of the question. However, the court should keep in mind that we are concerned with the formulation of a tax scheme which was based upon the ton-mile theory but which theory has been misapplied because, as pointed out heretofore, the formulation includes many items not due to weight. Professor Worley testified that he had never known in all the years of his experience the ton-mile theory to be so applied before.

The court should also keep in mind that the theory of the ton-mile tax is that it is based on the cost to transport one ton of cargo for one mile, but under this act the tax is actually assessed without reference to whether the vehicle travels one mile or one million miles. It may be well enough to talk about the unlimited privilege but where certain of these carriers are limited by law to operate over fixed routes they are not able to make use of the unlimited privilege.

A tax based on seating capacity, *Sprout* v. *South Bend*, (*supra*) a tax based on earning capacity, *Interstate Transit Inc.* v. *Lindsey*, (*supra*) a tax based on chassis weight not related to mileage traveled or tonnage carried, *Prouty* v. *Coyne*, (*supra*), and a tax levied on gasoline carried in the tank *McCarroll* v. *Dixie Greyhound Lines, Inc.*, (*supra*), were all declared unconstitutional by this court because the formula used produced a tax that was not an accurate measure of the benefit received from the use of the state's highways.

It is interesting to observe that this court declared invalid a California caravan tax of $15.00 where the evidence showed that the attendant cost to the state was only $5.00. In other words the tax was 300% of the cost to the state, for the benefit received by the motorist. Here Professor Worley's testimony showed that this tax in some classification was 300% more than it should have been, because of the inclusion of all the costs "not due to weight" (Plaintiff's exhibit 16, R. 275; offered at R. 133). The line must be drawn somewhere. While we recognize that scientific accuracy is not required, yet we contend that a tax schedule which is 300% more than it should be, is unconstitutional. If the tax were only slightly excessive it might not be unconstitutional, but this 300% discrepancy is so great and the dollar value of the tax is so high, as pointed out hereafter in Point IB, that this tax must fall.

The term "fair and reasonable compensation" for the privilege of road use is not self-defining. Courts must look to some rational basis which relates the tax to the privilege, and ultimately courts must be guided by the cost of constructing and maintaining highways and regulating traffic thereon. Unless both the amount of the tax and the basis for the tax are taken into consideration in determining the constitutionality of a taxing statute, constitutional safeguards mean nothing in the face of "legislative discretion." In determining the constitutionality of vehicle taxes, courts inevitably encounter the problem of determining, as Mr. Justice Frankfurter said in the *Brice* case, "how much is too much;" they may resort to examination of the tax formula to see if it reasonably relates the tax to the value of the privilege granted, or they may judge excessiveness in terms of economic strain on the carrier. We submit that by the long-established weight of authority courts have required that a tax formula bear a reason-

able relationship to the privilege of road use, and that it be nondiscriminatory in its operation.

Therefore, in judging the constitutionality of the 1951 Amendment the basis of the tax must be considered, and if it results in an arbitrary, discriminatory tax or a tax which is in excess of fair or reasonable compensation for road use as applied to the heavier vehicles or a tax which is unrelated to the value of the privilege, it cannot be upheld, for it then imposes an undue burden on the heavier and more efficient vehicles engaged in interstate commerce.

We submit that the evidence adduced by the plaintiffs in the case at bar conclusively demonstrates that because of the formula used, the tax schedule in the 1951 Act unreasonably discriminates against the heavier and more efficient trucks in favor of passenger cars and lighter vehicles, and that the tax basis and the resultant schedule of fees utterly fails to bear any reasonable relation to the privilege of road use. Accordingly, we submit that the Supreme Court of Illinois erred in failing to hold that the 1951 Amendment constituted a direct and unconstitutional burden on interstate commerce.

B.

The tax is excessive in amount.

In considering the effect of the 1951 Amendment on interstate commerce, we call the Court's attention to the very important fact that *there is no known tax relating to motor vehicles that approaches in amount the tax involved in this litigation.* Defendants can cite no case where the United States Supreme Court or any State appellate court has ever sustained any similar tax which is as high as the tax embodied in the 1951 Illinois Amendment. Mr. Justice Frankfurter, in his dissenting opinion in *Capital Greyhound Lines* v. *Brice*, 339 U.S. 542, 94 L. ed. 1053, states that the largest annual tax based upon size

or weight which has been sustained is $75, and the largest tax on any basis which has been sustained is $400.00 annually. He lists the following cases among others.

Name of Case	Range of tax amounts for the entire class
1. *Hendrick* v. *Maryland*, 235 US 610, 59 L ed 385, 35 S Ct 140 (1915)	$ 6 — $ 18
2. *Kane* v. *New Jersey*, 242 US 160, 61 L ed 222, 37 S Ct 30 (1916)	$ 3 — $ 10
3. *Clark* v. *Poor*, 274 US 554, 71 L ed 1199, 47 S Ct 702 (1927)	$20 — $200
4. *Sprout* v. *South Bend*, 277 US 163, 72 L ed 833, 48 S Ct 502, 62 ALR 45 (1928)	$25 — $ 75
5. *Interstate Transit, Inc.* v. *Lindsey*, 283 US 183, 75 L ed 953, 51 S Ct 380 (1931)	$50 — $750
6. *Hicklin* v. *Coney*, 290 US 169, 78 L ed 247, 54 S Ct 142 (1933)	$30 — $400

Compare these taxes listed above with the taxes under this 1951 Act which can amount to $1588.00 per truck annually.

Since this 1951 Illinois Act represents a new and unprecedented tax imposition, reference to the leading cases on the subject of motor vehicle taxes can only be of limited assistance in determining the validity of this latest Illinois enactment. The Court should not lose sight of the wide gulf which separates this 1951 Act from the taxing statutes involved in any of the decided cases.

It is our position that this terrific difference in the amount of the tax makes it actually amount to a difference in kind rather than a difference in degree.

In each and every case that has come before this court from *Hendrick* v. *Maryland*, (*supra*), decided in 1915, until *Capital Greyhound Lines* v. *Brice*, (*supra*), decided in 1950, the court has stated that the tax must be reasonable in amount.

This tax is not reasonable in amount. It is excessive.

In *Hendrick* v. *Maryland*, 235 U.S. 610, 59 L. ed. 385, the court, in upholding a tax ranging from $6.00 to $18.00 stated (p. 624): ". . . *so long as they are reasonable* and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce."

Can the court look at an $18.00 fee in the same way it looks at a $1588.00 fee?

In *Kane* v. *New Jersey*, 242 U.S. 160, 61 L. ed. 222, at page 166, the court spoke of the power of the state to

". . . exact reasonable compensation."

In *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245, 72 L. ed. 551, the court stated at page 249:

". . . the state may impose a reasonable charge."

In *Clark* v. *Poor*, 274 U.S. 554, 71 L. ed. 1199, the court said at page 557:

"Nor is it suggested that the tax is so large as to obstruct interstate commerce."

In *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U.S. 285, 79 L. ed. 1949, the court in upholding an annual fee of $25.00 stated that the fee was moderate in amount.

In *Aero Mayflower Transit Co.* v. *Board of Railroad Commrs.*, 332 U.S. 495, 92 L. ed. 99, the court commented that annual taxes of $10.00 and $15.00 were fair and reasonable.

In upholding the constitutionality of a Georgia statute imposing a maintenance tax upon motor carriers measured by rate of capacity and factory weight of trucks and trailers, the court stated in *Dixie Ohio Express Co.* v. *State Rev. Comm.*, 306 U.S. 72, at 76:

"It is elementary that a State may not impose a tax on the privilege of engaging in interstate com-

merce. (Citations). But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a *fair and reasonable tax as compensation* for the privilege of using its highways for that purpose."

Referring again to *Capital Greyhound Lines* v. *Brice, supra,* the court stated at page 547:

"... taxes like that of Maryland here are valid *unless the amount is shown to be in excess of fair compensation* for the privilege of using state roads.

"*Our adherence to existing rules does not mean that any group of carriers is remediless if the total Maryland taxes are out of line with fair compensation due to Maryland.* Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied."

And in *Prouty* v. *Coyne,* 55 F. 2d 289 (D.C., S. Dak.), the opinion by the three-judge Federal court declared (p. 292):

"The state may constitutionally impose a tax burden on interstate commerce as compensation for the use of the public highways, *provided the charge is only a reasonable and fair contribution* to the expense of construction and maintenance of such highways and of regulating the traffic thereon."

In this case the court held the South Dakota graduated license fee statute invalid as to interstate carriers. The challenged statute contained fees based on the greater of manufacturer's weight of *chassis* or actual *chassis* weight, with fees ranging from $15.00 to $400.00.

Compare these taxes with the tax in the case at bar. A holding that an annual tax of $18.00, or $10.00, or $75.00, or $200.00, or $400.00 constitutes no undue burden on interstate commerce is no precedent for holding that an annual tax of $1588.00 is not a burden on interstate commerce.

This particular tax has never been considered by this court before and this court is free to hold this tax unconstitutional, because this court has never before decided a case that compared with it.

It can't be denied that this tax is a burden. The following are typical examples of the effect of this act to increase license fees on some of the plaintiffs in this case and show the fees that were due in 1951 under the old act and the new fees that are due in 1952 and 1954 under the new act (R. 38-97):

License Fees.

Party	1951 fees	1952 fees	1954 fees
Co-Ordinated Transport (R. 38)	$ 4,000.	$35,000.	$45,000.
Wagner Transfer (R. 54)	541.	8,000.	11,299.
Alton Box Board Co. (R. 61)	11,133.	29,509.	41,050.
Russell Young (R. 65)	11,986.	26,049.	36,414.
Cecil Kain (R. 69)	350.	894.	1,250.
Rockford Motor Service (R. 71)	4,640.	11,695.	16,432.
Ryan Ft. Lines (R. 75-76)	2,970.	9,422.	12,520.
Elgin Storage & Transfer Co. (R. 83)	9,712.	22,209.	31,121.
Gold Star Motor Service (R. 87)	3,839.	8,793.	12,226.
Dumont Cartage (R. 89)	5,882.	14,916.	20,899.
Valentine Transfer & Storage Co. (R. 94)	1,251.50	3,740.	4,934.
Granite City Steel Co. (R. 97)	4,224.	7,422.	10,348.

Many of the plaintiffs testified that the new annual taxes or *fees to be charged under this act were in excess of the net income they realized in* 1951 (R. 41, 54, 65, 69, 71, 75-76, 83, 87, 89). Many of them testified they would be forced out of business because of the excessive amount of this tax. The confiscation point is covered later in our brief but in determining how much is too much the court should have these facts in mind.

Look at the effect that this Act will have on the business of Co-Ordinated Transport with an increase in fees from

$4,000.00 in 1951 to $45,000. in 1954. This is *an increase of over* 1000%. And Wagner Transfer Co. with an increase of from $541.00 to $11,299.00, *an increase of over* 2000%.

Is this a "fair" or "reasonable" tax "moderate in amount"?

In determining the validity of this tax it should also be noted that the plaintiff, Alton Box Board Co., operates its trucks from Alton to St. Louis and return, and on this entire round trip it travels only three miles on the Illinois highways (R. 61) and for this it is going to have to pay to the State of Illinois in 1952 fees totalling $29,509.00 and in 1954 fees totalling $41,050.00.

Is this reasonable?

It should be kept in mind that this court stated in *Hendrick* v. *Maryland*, (*supra*) and has never departed therefrom, that (p. 622):

> "The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce. . . ."

It should also be kept in mind that under the 1951 Amendment the taxpayer's optional provision for basing the tax on the actual miles travelled has been eliminated, so that the Alton Box Board Co. must pay taxes aggregating $41,000. for travelling three miles on the Illinois highways. We are aware of the cases which comment that the taxpayer has the privilege of travelling as many miles as he wishes, but those statements have never been made in any case that had a tax as huge as this.

It may be fitting to speak of a tax as a payment for a privilege when the amount exacted is small. The small tax cannot burden interstate commerce even if the taxpayer fails to exercise the privilege. But with a huge tax such as levied by the 1951 Amendment the very size of the taxes

makes it apparent that the commerce is burdened even if the privilege is exercised to the fullest extent. As Justices Frankfurter and Jackson stated in the *Capital Greyhound* case, *supra* at p. 558:

> "When a privilege tax is relatively small in amount, and therefore to be treated as a rough equivalent for what the State may exact with due regard to administrative practicalities, the danger of an unfair burden falling upon interstate commerce remains correspondingly small. Cf. *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 210, 211, 88 L. ed. 1227, 1232, 1233, 64 S. Ct. 967, 152 ALR 1072. But a large privilege tax presents dangers not unlike those arising from unapportioned gross receipts taxes on interstate transportation beyond a State's power to impose. (citation) . . ."

The 1951 Act was based in large part on data contained in the Griffenhagen report (R. 183, 184, 201). Griffenhagen and Associates is an engineering firm that was employed under an agreement with the Highway Department at the direction of the Highway and Traffic Problems Commission which was established by the legislature. They conducted a very extensive survey, extending over a period of two years, of the conditions of the Illinois highways and recommended a schedule of taxes to be adopted by the legislature of the State of Illinois to increase fees to be paid by trucks to help defray the expense of the maintenance and care of the highways. Mr. Frank N. Barker, Chief Highway Engineer of the State of Illinois, and the main witness for the State, testified that he considered the conclusions and recommendations contained in the report to be sound (R. 201). He assisted in the preparation of the report. He reviewed the report. Yet, notwithstanding that these experts recommended a schedule of fees to the legislature, the legislature completely disregarded their recommendations and enacted a bill which greatly increased the fees that had been recommended by Griffenhagen. For

example, a 10-wheeled 55,000 pound truck paid a fee of $420.00 in 1950; the Griffenhagen report recommended a fee of $765.00 (R. 281), and the same truck would be required under the 1951 Act to pay in 1954 a fee of $1588.00.

Mr. Justice Frankfurter, at page 559 of his opinion in *Capital Greyhound Lines* v. *Brice*, (*supra*) posed the question:

"How much is too much?"

Our answer is $1588.00 per year is too much.

As heretofore set forth, Professor Worley testified that he had made an analysis of the Act in question. He concluded that the taxes charged by this act *were excessive in some classifications by as much as* 300%.

We are thoroughly aware of the cases that state that no schedule of taxes needs to fit with a mathematical accuracy, but when the taxes are so high, so huge, of such considerable magnitude, so exorbitant and so excessive as the taxes charged by this Act, they must be stricken down as being an unconstitutional burden on interstate commerce.

It is interesting to observe that while the tax on trucks has been increased in some instances more than 300%, the tax on passenger vehicles has not been increased at all (R. 307). Defendants' exhibit 7 (R. 307; offered at R. 195) shows there were a total of 336,044 trucks registered in Illinois in 1949 and a total of 2,078,704 passenger cars. Could it be that the legislature was more concerned with the political effect of raising the taxes on 2,078,704 passenger cars than of making certain that the passenger car bore its fair share of the highway costs?

When the uncontradicted testimony in the case shows that the fees are twice as large as those recommended by the very experts appointed by the Legislature to study the problem, 300% excessive in some categories according to the testimony of Professor Worley, and more than *twenty*

times the size of any tax based on weight that has heretofore been sustained by this court, the tax is too high. Such a tax is far in excess of "fair" or "reasonable" compensation for the privilege of using state roads and imposes an undue burden on interstate commerce in violation of Sec. 8, Article I and Sec. 1, Amendment XIV of the Constitution of the United States.

II.

The taxes imposed by the 1951 Amendment are confiscatory and violate Section 1 of the 14th Amendment to the Constitution of the United States of America.

We have earlier considered, in connection with the 1951 Amendment to the Motor Vehicle Law of Illinois being a burden on interstate commerce, that the tax is too high. So, too, in considering whether or not the law imposes a confiscatory tax the question becomes "how much is too much?"

Admittedly, there are relatively few cases where Courts have been obliged to determine that taxes levied by state legislatures have been so excessive as to constitute a violation of the due process clause of the 14th Amendment. This fact is true because legislatures have generally considered the interests of their constituents and the right of the people to carry on legitimate businesses and have realized that forcing such businesses to discontinue would necessarily in the long run result in a decrease rather than an increase in the state's revenue.

Despite the relatively few holdings that taxes have been confiscatory, the Courts have always recognized that if a tax were confiscatory it would violate the 14th Amendment. For example, in *Dane* v. *Jackson*, 256 U.S. 589, at page 599, this Court said:

> ". . . where, as here, conflict with Federal power is not involved, a state tax law will be held to conflict

with the 14th Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,—'to spoliation under the guise of exerting the power of taxing.'"

Again, in the *Ohio tax cases*, 232 U.S. 576, this Court, citing with approval an Ohio case, quoted therefrom at page 589:

> "These limitations (the guarantees contained in the Bill of Rights) prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, *but finally in the Courts.*"

And the Court further points out that:

> "... it was not intended to hold that the Courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional."

So, too, have the Courts of almost every state recognized the basic principle that the legislature may not prohibit useful enterprise by excessive taxation.

The Supreme Court of Alabama in *State* v. *Kartus*, 230 Ala. 352, 162 So. 533, at 537, quoting from an earlier case, said:

> "In the levy of a privilege or license tax the Legislature is not restricted as to the trades, businesses, or occupations which it may select, or the amount levied, so long as it does not discriminate between members of the same class, that is, those similarly situated, and the tax must not be so exorbitant as to prohibit or oppress or restrain a legitimate and useful trade, business, or occupation, as distinguished from a certain

class which, while tolerated is recognized as being hurtful to public morals, productive of disorder or injurious to the public."

And the Supreme Court of Florida, in *Jerome H. Sheip Company, et al* v. *Amos,* 100 Fla. 863, 130 So. 699, at 707, said:

"Where the public health and safety are not involved, the ultimate test is whether or not the tax so imposed upon the privilege is so arbitrary or oppressive as to prohibit a great number, if not all persons, from pursuing occupations otherwise lawful."

See also *State ex rel Bonsteel* v. *Allen,* 83 Fla. 214, 91 So. 104.

The Circuit Court of Appeals for the Tenth Circuit in the *Morton Salt Company* v. *City of South Hutchinson* case, 159 F. 2d 897 at 901 has summed up the basic law in these words:

"But, however great the legislative power of taxation, it is not wholly without constitutional limitations. The due process and equal protection clauses of the Constitution do provide some measure of protection against the abusive exaction of a tax. The test of due process, say the courts, is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. In other words the query is, what has the state given for which it may ask return. . . . If the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and the benefit received that it amounts to an arbitarary taking of property without compensation, it is said to violate the due process guarantee under the 14th Amendment. All of the cases which have affirmed the broad powers of taxation have recognized these limitations."

Obviously, it becomes necessary to study the tax imposed by the 1951 amendment to the Illinois Motor Vehicle Law to determine whether it does in fact confiscate the trucking

industry in Illinois. As we have heretofore demonstrated, the tax imposed is based on the weight of the vehicle with its maximum load and the maximum tax is $1588.00 a year, while the largest annual tax based upon size or weight heretofore sustained by the Supreme Court of the United States has been $75.00 and the largest tax on any basis sustained by this Court has been $400.00 annually. Obviously, at some point a state legislature imposes a tax which is prohibitory, and we submit that the Illinois legislature has done so in this case, where the amount involved is more than treble the highest tax of any nature heretofore sustained by this Court against the owner of a truck.

Let us examine the evidence in this case to determine how the tax affects truckers. Each of the 54 plaintiffs in this suit owns one or more vehicles subject to the taxes imposed, and each is engaged in hauling personal property within or partly within and partly without the State of Illinois. Most of the plaintiffs transport personal property belonging to others either for hire or under contract, and the rest of the plaintiffs own trucks for the transportation of their own property. They constitute, we submit, a complete cross-section of the trucking industry. Among those who testified in the trial of this case were line haul carriers (R. 37-82-94), short haul carriers (R. 71-75-82-86-88), local carriers (R. 46-53-71-75-77-80-82-86-88-94), contract carriers (R. 53), truck brokers (R. 65-69) and private carriers (R. 61-69). They are engaged in both intrastate and interstate commerce; some of them own trucks which never leave the confines of a particular municipality (R. 71-76-83-89); many of them carry all types of merchandise as common carriers, while others specialize in various types of merchandise ranging from agricultural products (R. 77-80) to steel and machine hauling (R. 53); they range from the owner of one tractor, which constitutes only a portion of a licenseable unit (R. 69) to businesses which own as

many as 59 power units (R. 83) and they constitute a complete cross-section of the trucking industry within the State of Illinois, with the possible exception of a certain few very large cross country haulers who own hundreds of units, at least one of which is a party to this case but did not testify. Actually, more truck operators were available to testify in this case as to their operations and the effect of the amendment to the Motor Vehicle Act on their operations, but were not called since both opposing counsel and the trial court indicated that they had heard enough of this type of testimony (R. 91). Admittedly, all affected truck operators in Illinois did not and could not testify, but since the record contains the testimony of all types of truckers who are representative of the industry, we submit that the uncontradicted evidence in this record is demonstrative of the effect of the licenses imposed on the entire trucking industry.

Let us, therefore, examine in detail a few examples of the testimony presented:

Milton Gerwin, President of Co-ordinated Transport, Inc. of Illinois, and of Motor Equipment Company, testified (R. 37 *et seq.*) that in 1951 under the old law his license fees were approximately $4000.00, they would become approximately $35,000.00 in 1952 and approximately $45,000.00 in 1954 under the new law, that the capital invested in his companies is about $500,000.00, and that in 1950 the companies' net income before taxes was approximately $11,000.00.

Marvin Wagner, a partner in Wagner Transfer Company, testified (R. 53 *et seq.*) that in 1951 their license fees were about $541.00; that in 1952 they would become, under the new Act, a little over $8000.00, and in 1954 $11,299.00, and that the net income for 1950 was $7356.00.

Russell M. Young testified (R. 65 *et seq.*) that he is a

truck broker furnishing trucks and drivers to common carriers; that he paid $11,986.00 in license fees in 1951 on 50 trucks; that he had disposed of 12 trucks, but on the 38 remaining trucks he would have to pay $26,049.00 in 1952, and $36,414.00 in 1954; that his net income in 1950 was $17,236.35, and that he had drawn no salary or compensation from his business before figuring the net income.

Cecil Kain testified (R. 69 *et seq.*) that he had been a truck driver since 1935, and had gone into business himself April 2, 1951, when he bought a tractor which he leases with himself as driver to pull trailers belonging to a truck company; that his license fee in 1951 was $350.00, in 1952, under the new Act it would be $894.00, and in 1954 $1250.00; that his gross income from April, when he commenced business, until the time he testified late in 1951, was $5354.96, but that since his truck is not yet paid for he could figure that he had no net income.

Ralph Haen, vice-president and general manager of Rockford Motor Service, who has been in the trucking business since 1926, testified (R. 71 *et seq.*) that his 1951 license fees were $4640.00; that in 1952, under the new Act, he will have to pay $11,695.00, and in 1954 $16,432.00; that the capital invested in his company is $106,000.00; that his net income in 1952 was $3147.00.

Stephen F. Ryan testified (R. 75 *et seq.*) that he has been in the trucking business since 1935; that his 1951 license cost was $2970.00; that in 1952, under the new Act, the fees would be $9422.00, and in 1954 $12,520.00; that the capital investment in his company was about $60,000.00, and his net income in 1950 was $2542.00.

W. J. Edmonds, General Manager of Granite City Steel Company, testified (R. 96 *et seq.*) that his concern's 30 trucks carried a license fee in 1951 of $4224.00; that in

1952 the fees would be $7422.00 and in 1954 $10,348.00; that they hauled no property belonging to others, but were used primarily in inter-plant operations between two plants a block apart, and that in this operation the trucks crossed one state highway.

Other truckers testified in the record similarly. In almost every case the increase in truck license fees equalled or exceeded the net income of the truck concern.

In addition, two Chicago bankers testified (R. 100 *et seq.*) that their institutions had in the past made substantial loans to truckers for the purchase of equipment, and they were curtailing these loans because of the effect of the 1951 amendment to the Illinois Motor Vehicle Act.

The obvious purpose of the testimony of the truck operators was to demonstrate that in many cases the increase in truck license fees under the new Act would exceed the net income of the trucking concerns, and that in every case the additional license fees would at the very least reduce the net income to a point where the owner of a truck could not make a fair return on his capital investment. So, too, the curtailment of loans by banking institutions for the purchase of equipment by truckers because of the effect of the Act and the opinion of the bankers that truckers would be unable to make enough to repay such loans, is an irrefutable demonstration of the confiscatory effect of the excessive tax.

The appellees have argued throughout this case that the mere fact that a tax as applied to an individual may put such individual out of business is not considered a valid argument against the tax, and the Supreme Court of Illinois, in the case of *Bode, et al* v. *Barrett,* 412 Ill. 204, 106 NE 2d 521 so held. We cannot quarrel with this principle of law, but, we submit, as more and more individuals who constitute the class cumulate their testimony it becomes

more and more reasonable to assume that the effect of the tax on the industry as a whole will be prohibitory. Obviously, it would be impossible to place every trucker within the State of Illinois on the witness stand, and equally obviously it becomes necessary for the Court to take cognizance of the fact that the cumulative testimony of a substantial number of witnesses representative of the whole industry in fact indicates the effect and confiscatory nature of the tax on the entire industry. The trial court who heard the testimony of the affected truckers held that the tax in fact confiscated the trucking industry within Illinois. The rule is clear that an entire legitimate industry or a substantial segment of such industry cannot be prohibited by excessive taxation. The general rule is found in the decisions of every court in the country and is stated, for example, in 33 Am. Jur. at page 366, where it is said:

> "License for revenue—Ordinarily, the reasonableness of a license fee imposed as a tax is a question for the taxing power, and, in the absence of an abuse of such discretion, the Courts will not interfere. The tax imposed may not, however, amount to a prohibition or restraint of trade upon any legitimate and useful or harmless business or occupation, nor may it be oppressive upon a particular class."

So, too, in 37 C.J. at page 194 it is said:

> "If the fee or tax is imposed for revenue purposes, the amount thereof is particularly within the discretion and judgment of the legislative authority, state or municipal, and ordinarily will not be interfered with by the courts, unless the tax imposed amounts to a prohibition of a useful or legitimate occupation . . ."

One of the numerous cases following this rule which explains it in detail is *Fiscal Court of Owen County, et al* v. *F. & A. Cox Co.*, 132 Ky. 738, 117 S.W. 296, involving a graduated license tax on horsedrawn vehicles, which was held invalid. The Kentucky court said at page 298:

> "It may be conceded that ordinarily the reasonable-

ness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion. (Citing cases). This rule we think, however, is subject to the limitation that the tax imposed shall not amount to a prohibition of any useful or legitimate occupation. (Citing cases). While there are numerous authorities to the contrary, it will be found that the license fee involved in those cases was not prohibitive, and the courts simply declared the general rule that the reasonableness of the tax was a matter within the discretion of the taxing power. We can hardly believe that the same courts that announced that doctrine would hold to be valid an ordinance or statute imposing upon every physician and attorney at law an annual license tax of $10,000, or imposing upon every merchant a license of $5,000, or upon every washerwoman a tax of $1,000 per year. If a prohibitive license tax could be imposed upon the professions and occupations mentioned above, the same character of tax could be imposed upon every profession and occupation. It may be answered that no legislative or municipal body would ever do this. The question, however, is not what it would do, but what it might do. The question is one of power. A powerful organization of men engaged in different pursuits might prevent the imposition of a prohibitive license tax upon their respective callings or occupations, but what is to become of the man without political power, whose means of livelihood are taken away by the imposition of a prohibitive tax? Shall we still say that the amount of the tax is within the discretion of the taxing power, or shall we say that among the inalienable and inherent rights guaranteed by our Constitution to every law-abiding citizen is the right to live and enjoy life and the right to acquire property, and that these rights necessarily carry with them the right to gain a livelihood and acquire property by following any useful or legitimate occupation, the pursuit of which is not injurious to the public weal? In our opinion there is but one answer to this question: If you deprive a man

of the means of livelihood, you necessarily deprive him of the right to live and enjoy his life. Great as is the taxing power, it can never rise superior to the inalienable rights guaranteed by our Constitution. As the evidence in this case shows that the license tax in question is prohibitive, we have no hesitancy in declaring it invalid. (Citing cases.)"

Similarly, in the case of *State* v. *Lucas*, 196 La. 299, 199 So. 126, where a license tax on collecting money on copyrighted music books was held invalid, the Supreme Court of Louisiana, after pointing out that the gross business of the defendant was exceeded by the tax charged, said (p. 127):

"A statute which purports to levy a license tax upon a particular business or occupation, but which makes the tax so exorbitant that no one can pay it and carry on the business or occupation profitably, does not in fact license the business or occupation, but undertakes to abolish it. Such a statute is violative of the Fourteenth Amendment of the Constitution of the United States insofar as it deprives anyone of his right to carry on a lawful business or occupation."

The *Lucas* case is particularly significant since it is apparent that the evidence presented as to the business done by the affected business man as compared to the amount of the tax imposed is the same type of evidence as appears in the record in the case at bar. In addition, it would appear that the testimony of only one affected business man was held sufficient in the *Lucas* case to warrant the Court's determination that the entire business was in fact confiscated, whereas in this case the Court can see in the record the effect of the tax on a substantial cross-section of the affected industry.

The seriousness and sincerity of the appellants' contentions that the amendment to the Motor Vehicle Act, which increases the tax on truckers to the point where their businesses can no longer be profitable, violates the due process

clauses of the Constitution, is demonstrated by the following quotation found in 11 Am. Jur., 1147:

> "The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guarantees of the Fourteenth Amendment. It has been said that the preservation of such right is the principal purpose of the Constitution itself and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. The right is fundamental, natural, inherent, and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business, occupation, or calling is 'property' within the meaning of the constitutional provisions as to due process of law and is also included in the right to liberty and the pursuit of happiness."

The Supreme Court of the United States has established a line of cases holding that a confiscatory tax is unconstitutional. When dealing with Federal statutes, of course, the due process clause of the 5th Amendment, instead of the due process clause of the 14th Amendment, which applies to State laws, is the basis used by the Courts for their holdings. The situation, however, and the interpretation of the law is identical and certainly directly in point in this case.

In the case of *Nichols* v. *Coolidge*, 274 U.S. 531, wherein the Supreme Court of the United States held a portion of the Federal Estate Tax Law unconstitutional, the Court said (p. 542):

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th amendment."

Although, in the case of *Tyler* v. *The United States*, 281 U.S. 497, the Statute was held valid, the Court said (p. 504):

> "The point made is that the tax is so arbitrary and

> capricious as to amount to confiscation, and, therefore, to result in a deprivation of property without due process of law. . . . The possibility that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th amendment must be conceded."

That the taxing power of the legislative branch of the Government is limited by the due process clauses of the constitution is obvious from the decisions above quoted and others; where, as in the case at bar, the fact of confiscation has been established by competent evidence and the Trial Court has so held, these decisions demonstrate beyond doubt that as a matter of law that holding must be sustained.

We are obliged to point out to the Court that many of the cases which appear at first blush to be in point are in fact no authority for the case at bar. The books are full of cases where states and municipalities have levied license fees for the sole purpose of regulation and not for the raising of revenue. Although the Motor Vehicle Act of the State of Illinois is primarily a regulatory measure, it is obvious that the tax imposed by Section 9 thereof is in fact a revenue tax as opposed to a regulatory license fee. Indeed, that section of the Statute here complained of first levies a flat $5.00 license fee, which is obviously a license under the police power, and then in the same section and in addition levies "for the use of the public highways a tax." There is no question that under the police power the legislature may charge a fee which repays the state for its expense in connection with the enforcement of the Act, and it has even been held many times that if, under the police power, the license fee charged *incidentally* yields a revenue that of itself does not make the Act unconstitutional, but where, under the police power, substantial revenue is sought to be raised such revenue taxes have always

been held unconstitutional. The Supreme Court of Illinois so held in *People* v. *Wilson,* 249 Ill. 195, 94 N.E. 141, where at page 202 it is said relative to the Act seeking to regulate itinerant vendors of drugs:

> "It has often been held that if the legislature, under the guise of regulation, fixes a license fee at so exorbitant an amount as to operate as a prohibition upon the business or calling sought to be regulated and thereby to create a monopoly, the effect would be to deprive the citizen of his liberty and of his property under the constitution, and that it would be within the power of the courts to declare such a statute invalid. (citing cases). While it is no objection to a tax imposed under the police power that it may incidentally yield a revenue, still the tax cannot be made so heavy on a legitimate occupation as to create a monopoly, or, in effect, prohibit the pursuit of the occupation."

So, too, the Supreme Court of Illinois, in the case of *Price* v. *The People,* 193 Ill. 114, 61 N.E. 844, involving the licensing of employment agencies, said at page 120:

> "What amount the applicant for a license shall be required to pay as a license fee is plainly committed to the General Assembly for determination, and the action of that department of the State government is conclusive, except, beyond serious doubt, it is manifest the amount of the fee has been in any particular instance established, not with regard to the purpose of regulation of the occupation with the view of protecting the public welfare, but with the real purpose to raise revenue under the guise of the police power, or to subvert the proper exercise of that power to the prohibition, by means of oppressive license fees, of the right of the citizen to exercise a lawful calling, in violation of the constitutional guarantees against the destruction of the liberty and property right of a citizen."

In view of the difficulty that Courts have had in determining whether levies were separate revenue measures or taxes levied as a part of and under the guise of regulatory

measures, and in view of the fact that the amendment to the Illinois Motor Vehicle Act might be deemed to be either, we submit that the cases cited heretofore have demonstrated that, whichever it is, this tax is necessarily violative of the due process clause in that it confiscates and prohibits the entire trucking industry within Illinois.

We must here point out to the Court what must be obvious to the Court, namely: that the trucking industry is a legitimate, useful and harmless occupation. The entire economy of the State of Illinois, and, indeed, of the United States, is largely dependent upon the continued operation of trucks on the public highways. Many communities could not exist without trucks. The very food on our tables, the materials from which shelters are built, steel, machinery and almost every imaginable type of product is moved from place to place by the trucking industry. That the industry may be regulated in the interests of the public has never been denied, and almost since the invention of motor vehicles they have been regulated as to speed and safety measures to protect the public, but certainly it cannot be in good conscience claimed that the industry under a police power and for the protection of the public can legitimately be prohibited. Harmful businesses may be prohibited, and if they may be prohibited under the police power, then they may be prohibited by excessive taxation, but as demonstrated above, the Courts have uniformly held that a harmless and useful business may neither be prohibited under the police power nor by taxation. The case of *Fiscal Court of Owen County et al* v. *F. & A. Cox Company, supra,* demonstrates this point in detail. The Illinois Supreme Court in the case of *People* v. *Brown,* 407 Ill. 565, 95 N.E. 2d 888, wherein the regulation of plumbers was held invalid, is a demonstration that the Courts of Illinois followed the theory of the Kentucky Court, although the Courts in Illinois had never been obliged to hold a

revenue act invalid because the legislature had never been so unmindful of the rights of its citizens as to adopt a confiscatory tax heretofore. The Illinois Court in the *Brown* case said at page 572:

"Section 1 of Article 2 of the State constitution declares all men have certain inherent and inalienable rights, three of them being the right to life, the right to liberty and the right to pursue happiness. Section 2 of the same Article declares none of three named rights, plus the right of property, shall be taken from a person except by due process of law, *i. e.* the law of the land. A person's business, profession, trade, occupation, labor, and the avails from each constitute 'property' envisioned in the two sections. The right to follow any of those activities is 'liberty' as also envisioned therein. Those rights guaranteed by the constitution are not unqualified rights to be exercised regardless of harm to others at all times or places. There must be a yielding, partially or wholly, thereof for the common good of society when the State so commands through the *rightful* use of its inherent police power to secure either the public health, morals, safety, comfort or common welfare.

"That power is great and reaches far, but its use is hedged with restrictions. The fact the legislature has invoked the police power for regulatory purposes directed against an activity such as a trade, etc., is not conclusive that the power was lawfully exercised. Whether it was lawfully used in a given instance is a judicial problem belonging exclusively to the courts. (Citation). The restraint imposed upon a legitimate activity by an exercise of the police power for regulatory purposes must be a reasonable one, be for the protection of the public health, morals, safety, comfort or common welfare, and also be reasonably adapted to attain the objective intended. (Citations) Statutes enacted under that power must be construed, if possible, so as to avoid infringing any of those basic rights. (Citation) The legislature cannot enact a lawful statute by invoking the police power on the pretense of protecting public interests when the actual objec-

> tive of the statute constitutes an arbitrary interference with private business, or imposes unusual and unnecessary restrictions upon lawful occupations; if such statute does not tend to preserve the public health, safety or welfare, it is void as an invasion of individual property rights.".

This case demonstrates that the right to engage in a useful business such as the trucking business is a right which is guaranteed by the Constitutions of Illinois and of the United States. To allow a tax enactment, and particularly a tax enactment written into a regulatory measure, to stand as the law of the State of Illinois, when it in fact deprives the citizens of the State of the right to engage in a useful occupation, which occupation is vital to the economic welfare of the people of the State, would serve only to make a mockery of the Constitutional guarantees of property, liberty and pursuit of happiness. Cases such as these, holding that under the police power it is unconstitutional to prohibit a legitimate, useful and harmless business or occupation, certainly are the law of the land. Certainly, the legislature may not, under the guise of a revenue measure, prohibit such a business or occupation where it may not do so directly. Dealing with the Federal Congress, it is said in 51 Am. Jur., 98:

> "Where the Federal Congress, which has no general police power, has no power to regulate a particular subject matter directly, it cannot do so under the guise of taxation."

It necessarily follows that the State legislature, although it has a general police power, but does not have the power to prohibit a legitimate business under that police power is, within the scope of prohibitory enactments, identical to the Federal Congress. Where the legislature cannot prohibit a particular business directly, it cannot do so under the guise of taxation.

It should here be pointed out that we are not inquiring into the motives of the legislature in passing the excessive tax on trucks. It is elementary that the motives of the legislature cannot be questioned. However, irrespective of the legislature's motives, the fact is that it has here passed a tax so excessive in amount that, as shown by the evidence in this record, it necessarily will prohibit the trucking industry. The Trial Court having determined the fact issue that the industry is prohibited and confiscated, it is the province of this Court now to determine whether, as a matter of law, the Trial Court erred in holding the Act unconstitutional. We submit that from the cases cited it is clear that such a prohibitory tax does violate the due process clause of the Federal Constitution, and is, therefore, unconstitutional.

As suggested above, the witnesses who here testified constitute a cross-section of the entire truck industry with the exception of the large line haul carriers. It could be argued, therefore, that perhaps those large concerns might not be affected by the tax as are the smaller truckers. Assuming this to be the fact, then the elimination of the smaller operators from the trucking industry by operation of the tax would tend to create in those large carriers a monopoly in the trucking business. Confiscation of an industry by a prohibitive tax is not limited to the entire wiping out of the industry, but, under our law, if a large segment of an industry can no longer profitably operate and a tendency toward monopoly is thus produced by the legislative enactment, such enactment is by reason thereof just as invalid as if the entire industry were wiped out. The Illinois Court, in the case of *People* v. *Kastings*, 307 Ill. 92, 138 N.E. 269, in considering the validity of sections of the Illinois Motor Vehicle Law having to do with the bonding of taxicabs, said at page 108:

"It is apparent, without any argument, that Section

42a of the Statute, providing for such bonds and insurance as security, if allowed to stand as enacted, would permit discrimination between the two classes of taxicab owners,—those giving bonds and those providing insurance,—and in addition to that would make it practically impossible for any taxicab owner to comply with the statute by the giving of a bond with two or more personal sureties. It would also tend to create a monopoly in the taxicab business because of its tendency to prohibit many efficient, honest and careful operators of taxicabs owning their own machines from further pursuing their occupation because of the fact that they may be unable to bear or pay the high rates for insurance or for surety bonds that may be required of them. For all of the reasons aforesaid we hold that the entire Section 42A is void."

The only possibility that the trucking industry could exercise to avoid confiscation under the terms of the amendment to the Motor Vehicle Act and in view of the testimony present in this record, would be to pass the additional license costs on to the consumers. This could be done only if the truckers engaged in hauling for hire could raise their charges to the public for such service. The record discloses by uncontradicted testimony that such raises of rates are impossible. The rates of line haul carriers are fixed by a Rate Bureau subject to the approval of the Interstate Commerce Commission and are more or less uniform throughout the entire Midwest area. If Illinois truckers, by reason of higher license fees, were given a higher rate, their business would necessarily go to carriers from other states operating at lower rates (R. 50).

The short haul carriers have virtually no voice in the construction of the through overhead rates in interstate commerce. The line haul carriers establish the rates through the Rate Bureaus, and the short haul carrier, who actually makes the delivery, simply participates in the line haul rate and is forced to take what the line haul operator wishes to give (R. 84).

The intrastate rates are not regulated, but are limited by very keen competition and by competition not only with other intrastate common carriers, but also with private carriers and contract carriers, and the increases, therefore, cannot be passed on to the customer. (R. 84).

From the testimony outlined above, it is clear that the tax increases could not be passed on to the public; and, as pointed out above, since these increases cannot be assumed by the truckers without making their operations unprofitable, it necessarily follows that the industry is confiscated by the action of the legislature. With this fact situation existing, we submit, in view of the authorities cited, that the amendments to the Illinois Motor Vehicle Law increasing the tax rates to the point that they are prohibitory is unconstitutional and void as depriving those citizens comprising the truck industry of their right to engage in a legitimate and useful occupation, thus depriving them of their property and their liberty as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III.

The 1951 Amendment contains numerous arbitrary, inconsistent, vague and uncertain classifications in violation of Section 1, Amendment XIV of the Constitution of The United States.

In previous portions of this brief appellants have urged that the 1951 Amendment to the Illinois Motor Vehicle Law is discriminatory in its operation and violates various provisions of the United States Constitution. The subject of discrimination viewed from several standpoints is treated in considerable detail in Point I of this brief, relating to the Commerce Clause. It is not our purpose to repeat here portions of that argument relating to discrimination. It should only be noted that the broad issue of discrimination

with all its ramifications appears not only in the argument under the Commerce Clause but throughout this brief.

A first reading of the 1951 Amendment to the Illinois Motor Vehicle Law reveals the fact that it contains a great number of arbitrary, inconsistent, vague and confusing terms and classifications. We shall, in the following pages, point out to the court the more important of these. Before doing so, however, we propose to outline briefly the respects in which we contend these terms and classifications are violative of the United States Constitution and we shall review some of the more important cases on the subject.

Throughout its history, this court has been called upon many times to apply Section 1, Amendment XIV of the Constitution of the United States, the Equal Protection Clause. In treating the subject of the Equal Protection Clause as it applies to classification within a statute, both United States Supreme Court cases and cases from state appellate courts are substantially uniform in their interpretation of that clause.

In *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 150, the court had before it a Texas statute which provided that if any person had any of certain specified claims against a railroad company and should present his verified claim to an agent of the railway, and the claim should not be paid or satisfied within thirty days, the claimant, upon finally establishing his claim in court, would be entitled to reasonable attorney's fees not to exceed $10.00. That statute applied only to railroads.

This act was held to be in violation of the Equal Protection of the Laws Clause and Mr. Justice Brewer in his opinion used language which this court has seen fit to quote on numerous occasions. At p. 155 the opinion reads:

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states the power of

classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, (citations), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the 'attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Likewise, in the case of *Truax* v. *Corrigan*, 257 U.S. 312, this court was presented with another statute alleged to violate the Equal Protection Clause. That enactment by the Arizona legislature declared that the courts in that state were without power to enjoin picketing of an employer, unless violence was used. The court, in an opinion by Mr. Chief Justice Taft, declaring this statute violated the Equal Protection Clause for the reason that it constituted arbitrary class legislation unreasonably discriminatory against employers said, (P. 337):

"Classification must be reasonable. As was said in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U.S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' As was said in *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U.S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594: 'The rule . . . (*i. e.*, of the equality clause) is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on

persons merely as such, but on persons according to their relations.' The same principle is repeated and enforced in *Southern R. Co.* v. *Greene*, 216 U.S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247. 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

In the later case of *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515, the Equal Protection Clause arose in connection with an Oklahoma statute. In substance, that statute provided that cotton ginning businesses were public utilities and, as such, must obtain a permit from the state corporation commission in order to operate. The challenged portion of the statute provided that co-operatives need not make a showing of public necessity in order to obtain such a permit. The discrimination in the statute was that individuals and ordinary business corporations were required to make a satisfactory showing of public necessity as a condition to obtaining a permit to operate while co-operatives were not.

The court, speaking through Mr. Justice Sutherland, declared this was an arbitrary and unreasonable classification which rendered the challenged portion of the statute unconstitutional, stating at P. 521:

"Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the 14th Amendment? As the proviso was construed and applied by the commission and by the court below, its effect is to relieve all corporations organized under the Act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant and other individuals as well as corporations organized under general law, engaging in such business. That a greater

> burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. (Citation)

The Court then went on to hold that because this statute applied unequally to corporations, individuals and co-operatives without justification, it violated the Equal Protection of the Laws Clause. The court labelled the statute "arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation." (pp. 524-5)

Speaking with reference to the validity of the Hospital Authorities Act, the Illinois Supreme Court employed similar language to that used by the court in the above cited case. Thus in the case of *Grennan* v. *Sheldon,* 401 Ill. 351, 82 N.E. 2d 162, at 357:

> "The general rule is well settled that a classification which is based on a rational difference of situation or condition existing in the persons who are the subject of such classification is not within the constitutional prohibition of special legislation. (Citation) However, the class of persons in whose favor the legislation is enacted must be composed of individuals possessing in common some disability, attribute or qualification which distinguishes such class from others not so favored. (*Jenson* v. *Wilcox Lumber Co.,* 295 Ill. 294, 298). And this disability, attribute or qualification must bear some reasonable relationship to the purpose or object of the act. In other words, the difference of situation or condition must be a rational one in order to justify the legislative classification."

From the foregoing it is abundantly clear that, although the legislature has power to classify, such classification

cannot be arbitrary or without rational basis. As stated by Mr. Justice Brewer in *Gulf, C. & S. F. R. Co.* v. *Ellis, supra,* Page 159:

> "Arbitrary selection can never be justified by calling it classification."

There must be that "reasonable basis for differentiation" which the court referred to in *Continental Baking Co.* v. *Woodring,* 286 U.S. 352, 370. Moreover, that differentiation must serve the purposes of the statute in question and can not be justified merely because there is some conceivable differentiation between the persons or items classified under the statute.

As has been previously pointed out, weight was made the basis for the license fee schedule in the 1951 Act. In the trial court and in the Supreme Court of Illinois, appellants pointed out to the court classifications, several of which relate to weight, which are arbitrary, inconsistent and lack uniformity. The following are the more important of them.

A reading of Sections 9 (h) and 9 (i) of the Act clearly reveals that certain four-wheeled vehicles fall within both sections.

Section	Weight	Wheels	1954 Tax Rate
9 (h)	More than 24,000 pounds	4	$352
9 (i)	24,000 to 30,000 pounds	4 or more	$588

A four-wheeled vehicle having a gross weight of, say, 26,000 pounds would fall within the provisions of either section, and no one could determine whether such a vehicle should pay the smaller or greater tax.

Illustrating the inconsistency and arbitrariness of the schedule, a four-wheeled truck having a gross weight in excess of 30,000 pounds would fall only within Section

9(h) and would, therefore, pay the smaller tax. Witnesses Houska and Kennedy, testifying on behalf of the appellees, stated that such trucks do travel the Illinois highways. (R. 164, 166). Section 9 (i) applies to four-wheeled trucks whose gross weight is between 24,000 and 30,000 pounds, and under this section the owner of a vehicle weighing over 30,000 pounds pays less than the owner of a vehicle weighing less than 30,000 pounds!

Similarly, a reading of Section 9 (i)-3 and 9 (i)-4 indicates that ten-or-more wheeled vehicles having a gross weight in excess of 50,000 pounds but not exceeding 72,000 pounds fall within both sections.

Section	Weight	Wheels	1954 Tax Rate
(9) (i)-3	Over 50,000 pounds	8 or more	$1245
(9) (i)-4	50,000-72,000 pounds	10 or more	$1588

These inconsistencies in the schedule may be the result of hasty or careless draftsmanship, but whatever the reason for these unexplainable classifications in the fee schedule, their vice lies in the fact that they do not operate uniformly upon the class to which they apply and they discriminate unreasonably and unfairly.

It is obvious that the greater the number of wheels on a vehicle the more the load is distributed on the highway and the less damage will be done to the highway. Witness Redman so testified (R. 108). Nevertheless, under the 1951 Amendment an eight-wheeled vehicle weighing 60,000 pounds pays a smaller registration fee than a ten-wheeled vehicle of the same gross weight.

The 1951 Amendment provides a special and lower rate of tax for vehicles "used for transporting more than seven passengers entirely within the territorial limits of a single municipality, or a single municipality and municipalities contiguous thereto or a close radius thereof and equipped

with hydraulic shock absorbers and whose rates are subject to the regulation of the Illinois Commerce Commission." Following is a comparison of this special bus schedule and the schedule of fees for trucks of the same weight:

Busses		Trucks	
Weight	Tax 1954	Weight	Tax 1954
12-14000#	$ 45	12-14000#	$114
14-16000	70	14-16000	141
16-20000	105	16-20000	216
20-24000	145	20-24000	352
24-36000	195	24-30000	588
		30-36000	810

Almost every one of the witnesses who own and operate trucks testified that some or all of his trucks are equipped with hydraulic shock absorbers. (R. 55, 62, 66, 72, 76, 90, 97) The fact that rates of certain busses are subject to regulation by the Illinois Commerce Commission does not mean that the public interest in their operation is any greater nor less than in the operation of trucks whose rates are controlled by the Interstate Commerce Commission. Nor does rate regulation by the Illinois Commerce Commission make the damage done to the highways by these buses any less than that done by trucks of comparable weight. Witnesses Wagner, Ryan and Valentine testified to such rate regulation with respect to their trucks. (R. 55, 76, 94)

Numerous witnesses, engaged in the trucking industry, testified in behalf of the plaintiffs to the effect that some or all of their trucks operate solely within a city or within its immediate vicinity. Witness Walter Klassner of the Alton Boxboard Company stated that an important part of their operation was inter-plant which was entirely on their own property and not on the public roads (R. 61), that another operation was strictly within the city of Alton (R. 62).

Witness Marvin Wagner testified that 75% of his concern's business was within the city limits of St. Louis, Missouri (R. 55). Gerald Adams of the Elgin Storage and Transfer Company related that approximately 70,000 miles a year of that corporation's operation was within the corporate limits of Elgin, Illinois, where twenty of its units operate exclusively. (R. 83) Witness A. D. Church indicated that 90,000 miles were operated by the Gold Star Motor Service within the municipal limits of Chicago and adjacent municipalities. (R. 87) W. J. Edmonds, general manager of Granite City Steel Company, testified that that corporation had three plants in the immediate vicinity of Granite City—one plant one block away, the other plant four or five blocks away; 80% of the mileage of its fleet was inter-plant or within the plants. (R. 97)

Robert J. Hesselbaum testified that Dumont Cartage Company has some 18 trucks confined to municipalities and operating 125,000 miles per year within them. (R. 89) Witness Lloyd Valentine testified similarly, (R. 95), three of his trucks confined to the City of Aurora operating approximately 35,000 miles per year.

It is evident from the testimony of these witnesses that truck operators whose equipment is confined within the limits of a municipality operate each such truck 3,000 to 10,000 miles per year. These operators are generally engaged in the moving business or are private carriers operating between plants or warehouses. Their mileage is small, understandably. The reports of the bus operation in Aurora, Elgin, Rockford and Chicago, Illinois, (plaintiffs' exhibits 1-4 inclusive; R. 209-219; offered at R. 117) indicate that the average bus travels well in excess of 30,000 miles a year within a city, and accordingly derives far greater benefit from the highways than do the truck operators. Nevertheless, the comparison of truck and bus fees charted above shows convincingly that a truck pays a fee many times that of a bus of the same gross weight.

Certain vehicles are omitted entirely from the Act: Six or more wheeled vehicles under 30,000 pounds are not covered by a provision of the Act. Since no tax is imposed on such vehicles, the Act discriminates unfairly and unreasonably in their favor and against all other classes of vehicles.

There is no provision for the owner of a tractor only. Section (j) of the Act requires that the owner of a tractor shall pay the fee of the tractor plus one semi-trailer. One of the plaintiffs in this case, Cecil Kain, testified that he owns only a tractor but is obliged by the Secretary of State's Office to lease a semi-trailer and pay the tax thereon in order to obtain a license for his tractor. (R. 69) We submit that a tractor unit alone is not covered by the Act, which results in an arbitrary discrimination in favor of such vehicles and against other classes of vehicles.

In addition, we submit that the terms "gross weight" and "maximum load" are vague, uncertain and incapable of understanding without the assignment of an arbitrary definition.

Some point has been made of the fact that these phrases have been in the Act for thirty-two years. Never during those thirty-two years has the vagueness of these terms been challenged. If there was freedom from confusion during those thirty-two years, it was because the Illinois Secretary of State, arbitrarily and without a guide from the legislature, placed a meaning on those terms. In so doing, the Secretary of State, we submit, was unlawfully exercising legislative authority and his continued exercise of that authority gives rise to unreasonable discrimination. No estoppel against affected persons now raising the illegality of the delegation or the vagueness and uncertainty of the terms can be asserted by appellees.

The witness, Redman, an expert in the field of truck

engineering and design, discussed the term "manufacturer's rated capacity," (R. 109) and defined it as a scientific determination by engineers of the maximum load that trucks can safely carry and insure maximum life. The witness also stated that he has seen trucks loaded a 1000 per cent over and above the manufacturer's rated capacity. (R. 110) Obviously, therefore, the terms could refer to the manufacturer's rated capacity *or* the maximum load that could possibly be hauled by a given truck *or* the maximum load which any owner might care to place on his truck. Any one of these three meanings could be adopted by the Secretary of State in carrying out the provisions of the Motor Vehicle Law. It is apparent that the Secretary of State's Office not only could adopt any one of several meanings, but that it could, from time to time, change its mind and adopt another meaning for the term; indeed, the record shows that in another instance the Secretary of State did so change his mind. (R. 168) Prior to 1946, applicants for licenses were required to state the number of wheels on their vehicles. Arbitrarily, the Office of the Secretary of State assumed that there were but two wheels to an axle, (R. 168) although witness, Redman, testified there are sometimes as many as eight wheels on one axle. (R. 109) Although the new amendment to the Motor Vehicle Act still bases the tax on the "number of wheels", the Secretary of State now issues application forms and bases the license fee schedule on the "number of axles" instead of the "number of wheels." (R. 169) We suggest that the terms "maximum load" and "gross weight" are so vague and uncertain as to render them incapable of clear understanding and that as such they violate the Equal Protection Clause of the Constitution.

We, likewise, suggest that the term "like exemption and privileges" appearing in Section 20 of the Act as amended is similarly vague, uncertain and incapable of clear understanding.

In Section 9 of the Act which makes a separate classification of certain busses, the term municipalities and/or "a close radius thereof" appear. A similar term was discussed by the Supreme Court of Georgia in *Case-Fowler Lumber Company* v. *Winslett,* 168 Ga. 808, 149 S.E. 211; where those engaged in the manufacture of lumber products in or near cities of a certain size were subjected to a tax.

The court said at page 213:

> "The use of the word 'near' in making the classification subjecting certain persons and corporations designated by the Act as 'in or near cities,' as contained in paragraph 66 of the Tax Act, necessarily leaves to the tax officer the discretion of determining in many instances that some may be liable and others may not be liable, depending entirely upon the circumstances of each particular case; and for this reason the tax imposed by this Section is invalid and unenforcible."

Obviously, the words "close radius" in the Motor Vehicle Law amendment and "near" in the Georgia statute have identical meanings. Both are indefinite and leave to the Secretary of State the discretion of placing a particular vehicle in a certain class which carries a lower tax while at the same time placing a similar vehicle in another class which carries a higher tax.

Also appearing in section 9 of the 1951 Act is the phrase "agricultural pursuits." This term, we submit, is likewise vague and uncertain.

A farmer who butchers a steer and sells a side of beef to a neighbor is undoubtedly engaged in an agricultural pursuit. If such butchering is an agricultural pursuit, the Secretary of State could with equal force determine that a meat packer is also engaged in butchering and thus in an agricultural pursuit. Similarly, if a farmer who devotes a field to the growing of flowers is still engaged in an agricultural pursuit, the Secretary of State might determine that any nurseryman is engaged in agriculture,

and could even logically say that any florist who grew flowers was engaged in an agricultural pursuit. In view of the manner in which the Secretary of State translated wheels to mean axles, as pointed out above, we submit that he could also translate the term "agricultural pursuit" into any number of meanings. The foregoing illustrates very forcibly the lack of uniformity and absence of reasonable classification which is inherent in the 1951 amendment.

Not only is there an arbitrary and unreasonable discrimination against trucks in favor of certain busses, but even within the classification which the statute establishes for licensing trucks, there are any number of vague, uncertain, inconsistent and nonuniform differentiations which can have no relation to the purposes of the Act.

We submit, therefore, that because of these defects the 1951 Amendment is contrary to Section 1, Amendment XIV, of the Constitution of the United States and unconstitutional.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the final judgment of the Supreme Court of the State of Illinois should be reversed.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois.
REID and OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

APPENDIX "A"

An Act to amend Sections 9, 11a and 20 and to repeal Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (k) and 9 (l) of the "Motor Vehicle Law", approved June 30, 1919 as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. Sections 9, 11a and 20 of the "Motor Vehicle Law", approved June 30, 1919, as amended, are amended to read as follows:

SECTION 9. All owners of vehicles of the second division as described in Section 2 of this Act, which are designed or equipped or used for carrying freight, goods, wares or merchandise, and all owners of vehicles of said first division which have been remodeled and are being used for such purposes, and all owners of self-propelled vehicles operated as tractors to the weights of which are added the gross weights of the heaviest semi-trailers with their loads used with such tractors, and all owners of vehicles of said second division which are used for carrying more than seven persons, shall pay to the Secretary of State for each calendar year from and after January 1, 1936, for the use of the public highways of this State, a license fee of five dollars ($5.00) for each such vehicle.

Every application for registration of a truck subject to regulation under the provisions of "An Act in relation to the regulation of the operations of trucks designed or used for the transportation of property", approved July 25, 1939, as amended, shall, be accompanied by proof that a valid and unrevoked certificate of safety has been issued for each such truck. No certificate of registration or license plates shall be issued by the Secretary of State to the owner or any such truck unless such proof accompanies such application.

Every owner of a motor vehicle subject to the provisions of this section shall pay to the Secretary of State for each calendar year from and after January 1, 1952, for the use of the public highways a tax at the following rates, to-wit:

(a) Vehicles having a gross weight of three thousand (3000) pounds and less, including the weight of the vehicle and maximum load, $5.00.

(b) Vehicles having a gross weight of more than three thousand (3000) pounds and not more than eight thousand (8000) pounds, including the weight of the vehicle and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(c) Vehicles having a gross weight of more than eight thousand (8000) pounds and not more than ten thousand (10,000) pounds, including the weight of the vehicle and maximum load, $41.00 until January 1, 1954, and thereafter $58.00.

(d) Vehicles having a gross weight of more than ten thousand (10,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, $62.00 until January 1, 1954, and thereafter $87.00.

(e) Vehicles having a gross weight of more than twelve thousand (12,000) pounds and not more than fourteen thousand (14,000) pounds, including the weight of the vehicle and maximum load, $81.00 until January 1, 1954, and thereafter $114.00.

(f) Vehicles having a gross weight of more than fourteen thousand (14,000) pounds and not more than sixteen thousand (16,000) pounds, including the weight of the vehicle and maximum load, $101.00 until January 1, 1954, and thereafter $141.00.

(g) Vehicles having a gross weight of more than sixteen thousand (16,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the vehicle and maximum load, $154.00 until January 1, 1954, and thereafter $216.00.

(h) Four wheel vehicles having a gross weight of more than twenty thousand (20,000) pounds, and vehicles having more than four wheels, having a gross weight of more than twenty thousand (20,000) pounds, and not more than twenty-four thousand (24,000) pounds, including the weight of the

vehicle and maximum load, $251.00 until January 1, 1954, and thereafter $352.00.

(h-1) Four wheel vehicles designed and used for the carrying of more than seven passengers and equipped with balloon tires and hydraulic shock absorbers and having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicle and maximum load, $389.00 until January 1, 1954, and thereafter $545.00.

(i) Four or more wheeled vehicles having a gross weight of more than twenty-four thousand (24,000) pounds and not in excess of thirty thousand (30,000) pounds, including the weight of the vehicle and maximum load, $420.00 until January 1, 1954, and thereafter $588.00.

Six or more wheeled vehicles having a gross weight of more than thirty thousand (30,000) pounds and not in excess of thirty-six thousand (36,000) pounds, including the weight of the vehicles and maximum load, $579.00 until January 1, 1954, and thereafter $810.00.

Six or more wheeled vehicles having a gross weight of over thirty-six thousand (36,000) pounds, but not exceeding forty-one thousand (41,000) pounds, including the weight of the vehicle and maximum load, $635.00 until January 1, 1954, and thereafter $890.00.

(i-1) Six or more wheeled vehicles having a gross weight of more than forty-one thousand (41,000) pounds, but not exceeding forty-five thousand (45,000) pounds, including the weight of the vehicle and maximum load, $700.00 until January 1, 1954, and thereafter $980.00.

(i-2) Eight or more wheeled vehicles having a gross weight of more than forty-five thousand (45,000) pounds, but not exceeding fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $784.00 until January 1, 1954, and thereafter $1098.00.

(i-3) Eight or more wheeled vehicles having a gross weight of over fifty thousand (50,000) pounds, including the weight of the vehicle and maximum load, $889.00 until January 1, 1954, and thereafter $1245.00.

(i-4) Ten or more wheeled vehicles having a gross weight of more than fifty thousand (50,000) pounds, but not exceeding seventy-two thousand (72,000) pounds, including the weight of the vehicle and maximum load, $1134.00 until January 1, 1954, and thereafter $1588.00.

(j) A self-propelled vehicle operated as a tractor and one semi-trailer shall be considered as one vehicle in computing the above license fees. A semi-trailer used with any device for converting it to a trailer or attached to a leading trailer or semi-trailer shall be licensed as a trailer.

(k) Each additional semi-trailer to be used with a tractor licensed as above, $5.00.

(l) Tractors, traction engines or other similar vehicles used for hauling purposes, except as hereinafter provided, shall pay the same fees according to their weight as hereinbefore required in this section of other vehicles. All owners of trailers used with a motor vehicle shall pay to the Secretary of State for each calendar year from and after January 1, 1952, flat weight taxes for the use of the public highways of this State at the following rates to-wit:

(1) Trailers having a gross weight of 2,000 pounds and less, including the weight of the trailer and maximum load, $1.00.

(2) Trailers having a gross weight of more than two thousand (2,000) pounds, and not more than five thousand (5,000) pounds, including the weight of the trailer and maximum load, $15.00 until January 1, 1954, and thereafter $21.00.

(3) Trailers having a gross weight of more than five thousand (5,000) pounds, and not more than ten thousand (10,000) pounds, including the weight of the trailer and maximum load, $44.00 until January 1, 1954, and thereafter $61.00.

(4) Trailers having a gross weight of more than ten thousand (10,000) pounds, and not more than fifteen thousand (15,000) pounds, including the weight of the trailer and maximum load, $79.00 until January 1, 1954, and thereafter $111.00.

(5) Trailers having a gross weight of more than fifteen thousand (15,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the trailer and maximum load, $125.00 until January 1, 1954, and thereafter $175.00.

(6) Trailers having a gross weight of more than twenty thousand (20,000) pounds, and not more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

(7) Trailers having a gross weight of more than thirty-two thousand (32,000) pounds, including the weight of the trailer and maximum load, $557.00 until January 1, 1954, and thereafter $780.00.

Two axle vehicles which are designed and used for transporting more than seven passengers entirely within the territorial limits of a single municipality or a single municipality and municipalities contiguous thereto, or a close radius thereof, are equipped with hydraulic shock absorbers and whose rates for transportation are subject to the regulation of the Illinois Commerce Commission, a tax at the following rates:

(1) Such vehicles having a gross weight of more than twelve thousand (12,000) pounds but not exceeding fourteen thousand (14,000) pounds, including the weight of the vehicle and the maximum load, $45.00;

(2) Such vehicles having a gross weight of more than fourteen thousand (14,000) pounds but not exceeding sixteen thousand (16,000) pounds including the weight of the vehicle and the maximum load, $70.00;

(3) Such vehicles having a gross weight of more than sixteen thousand (16,000) pounds but not exceeding twenty thousand (20,000) pounds including the weight of the vehicle and the maximum load, $105.00;

(4) Such vehicles having a gross weight of more than twenty thousand (20,000) pounds but not exceeding twenty-four thousand (24,000) pounds including the weight of the vehicle and the maximum load, $145.00;

(5) Such vehicles having a gross weight of more than twenty-four thousand (24,000) pounds but not exceeding thirty-six thousand (36,000) pounds including the weight of the vehicle and the maximum load, $195.00.

The registration fee paid by the State of Illinois, or by any county, township, municipal corporation, city, village or incorporated town for each motor vehicle of the second division owned and operated by it, or by any school district for each motor vehicle of the second division owned and operated by it as a school bus, shall be two dollars for each calendar year.

Upon the filing in the office of the Secretary of State of said application and payment of the registration fee as hereinbefore provided, the Secretary of State, or his duly authorized agent, shall, without further fee, assign to such trailer or semi-trailer as described in said application, a distinctive number plate which shall be attached to the rear of the trailer or semi-trailer. Such license plate shall be so attached as not to swing loosely and shall be not less than twenty inches above the surface of the ground. It shall at all times be kept clean from grease and dirt. None of the owners of the vehicles of said second division shall be required to pay the registration fees in section 8 of this Act. Provided, that none of the provisions of this act requiring or prescribing registration shall be construed to include farm tractors, traction engines, threshing machines, clover huller, ensilage cutters, corn shredders, corn sheller, corn grinders, hay presses, portable saw mills, binders, combines, farm machinery and implements, farm wagons, or like vehicles, trailers or semi-trailers used in connection therewith, which are used primarily in the agricultural pursuits of the owner thereof or in connection with the agricultural pursuits of others, or vehicles used exclusively for moving water well drilling outfits, but nothing in this proviso shall exclude from registration truck tractors, trucks, trailers, or semi-trailers engaged in transporting agricultural products. The owner of any motor vehicle of the second division having a corn sheller, a well driller, hay press, clover huller or farm machinery permanently mounted thereon and used solely for transporting the same, shall pay the license fee of five dollars ($5.00), provided in

the first paragraph of this section and shall be exempt from the flat weight tax provided in this Act; Provided, that no such owner shall be entitled to any reduction in such five dollar ($5.00) license fee for the reason that such fee may first become payable during the second half of the calendar year.

Section 11a. Any person, firm or corporation who shall violate any of the provisions of Sections 3a, 9 or 10 shall be subject to a penalty of not less than $10.00, nor more than $100.00 for each offense, together with costs of suit, and shall also be held liable for the payment of all damages caused to any public highway by such violation. Any vehicle used in violation of any section of this Act and thereby causing damage to any public highway shall be subject to a lien for the full amount of all unpaid registration fees, flat weight fees, penalties and damages; provided, however, that such lien shall not release the offender from the full payment of all registration fees, flat weight fees, penalties and damages which may be due from him or be recovered against him in any court of competent jurisdiction and, provided, also that such lien shall not be superior to any chattel mortgage or other lien attaching to such vehicle.

Section 20. Except as herein provided for foreign corporations, the provisions of sections 8, 9, 10, 14, 17, and 27 of this Act, shall not apply to any motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence: and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privi-

leges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned.

In order to effectuate the purposes of this section, the Secretary of State of Illinois shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees and flat taxes under which motor vehicles, trucks, tractors, trailers or semi-trailers properly licensed or registered in other states may be operated in this State without an Illinois registration or the payment of permit fees or flat taxes; provided like privileges are accorded to vehicles owned by Illinois citizens when operated in such other states.

Section 2. Sections 9 (b), 9 (c), 9 (d), 9 (e), 9 (f), 9 (g), 9 (h), 9 (i), 9 (j), 9 (k), and 9 (l), of said Act are repealed.

Section 3. This amendatory act shall be effective January 1, 1952.

Approved July 9, 1951. (Ill. Rev. Stat., Vol. 2, p. 191.)

Office - Supreme Court, U.S.
FILED
AUG 15 1952
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 274

LIBRARY
SUPREME COURT, U.S.

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL.,

Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
JOHN C. FRIEDLAND,
State's Attorney of Kane County Illinois,
Counsel for Appellees.

JOHN T. CHADWELL,
Special Assistant Attorney General,
FRANK M. PFEIFER,
Special Assistant Attorney General,

INDEX

Subject Index

Page

Statement of appellees opposing jurisdiction and motion to dismiss or affirm 1
The appeal herein is without merit there being no substantial federal question involved 1
The issues in this case are governed by *Bode et al.* v. *Barrett, et al.* 2
The claimed unlawful burden on interstate commerce 3
The claim of confiscation in violation of the Fourteenth Amendment 9
The claimed violation of the Fourteenth by reason of alleged vague, arbitrary and inconsistent provisions 11

Table of Cases Cited

Aero-Mayflower Transit Co. v. *Georgia*, 295 U.S. 285 ..... 6, 8, 12
Anderson v. *Thomas*, 144 Ore. 572, 26 Pac. (2d) 60 12
Bode, et al. v. *Barrett, et al.*, 412 Ill. 204, 106 N. E. 2d 521 ..... 2, 3, 6, 12, 13
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 ..... 7, 8
Carley & Hamilton v. *Snook*, 281 U.S. 66 8
Clark v. *Paul Gray, Inc.*, 306 U.S. 583 5
Clark v. *Poor*, 274 U.S. 554 8
Collins v. *State*, 154 Okla. 121, 7 Pac. (2d) 123 12
Continental Baking Co. v. *Woodring*, 286 U.S. 352 12
Dixie Ohio Express Co. v. *State*, 306 U.S. 72 8
East Tenn. Motor Co. v. *Carden*, 164 Tenn. 416, 50 S.W. (2d) 230 12
Hendrick v. *Maryland*, 235 U.S. 610 5
Hicklin v. *Coney*, 290 U.S. 169 ..... 8, 12
Hudson v. *Stuart*, 166 Miss. 339, 145 So. 611 12
Iratacable, Ex Parte, 55 Nev. 263, 30 Pac. (2d) 284 12
Magnano Co. v. *Hamilton*, 292 U.S. 40 10

Page

Massachusetts v. *Mellon*, 262 U.S. 447 5
Metropolis Theatre Co. v. *Chicago*, 228 U.S. 61 8
Missouri, Kansas and Texas Ry. v. *Cade*, 233 U.S. 642 5
Nance v. *Harrison*, 176 Ga. 674, 169 S.E. 22 12
Smith v. *Cahoon*, 283 U.S. 553 12
Southern Railway Co. v. *King*, 217 U.S. 524 5
Sproles v. *Binford*, 286 U.S. 374 7
State v. *Public Service Commission*, 207 Wis. 664, 242 N.W. 668 12
United States v. *Sanchez*, 340 U.S. 42 11

STATUTES AND AUTHORITIES CITED

Act of 1951 (Illinois State Legislation) amending the Motor Vehicle Law of Illinois, Section 9 11
Constitution of the United States:
Article I, Section 8 2
Fourteenth Amendment, Section 1 2
Laws of the 57th General Assembly of Illinois, 1931, Page 789 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, A CORPORATION, ET AL.,

Plaintiffs-Appellants,

vs.

EDWARD J. BARRETT, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.

Defendants-Appellees

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Now come Edward J. Barrett, as Secretary of State of the State of Illinois, Donald Barnes, Commanding Officer of the Second District of the State Highway Police of the State of Illinois, and Anthony C. Wegman, Sheriff of Kane County, Illinois, and file their statement in opposition to appellants' statement as to jurisdiction and hereby move the Court (1) to dismiss the appeal herein or (2) in the alternative, to affirm the judgment of the Supreme Court of Illinois, from which judgment said appeal is taken. In support of the foregoing appellees specify the following:

The Appeal Herein Is Without Merit There Being No Substantial Federal Question Involved

Appellees urge that the appeal herein is without merit for the reason that the facts in this case and the decision

of the Supreme Court of Illinois do not present any substantial federal question requiring review by this Court. The contentions of appellants as set forth in their assignment of errors and jurisdictional statement fall within the following categories:

I. The instant case is not governed by *Bode vs. Barrett*, 412 Ill. 204, 106 N. E. 2d 521 (Docket No. 187, October Term 1952).

II. The Act in question imposes an unlawful burden upon interstate commerce.

III. The Act in question is confiscatory in violation of the Fourteenth Amendment.

IV. The Act in question contains vague, arbitrary and inconsistent provisions in violation of the Fourteenth Amendment.

We shall discuss these contentions in the above order, and demonstrate that the same are without merit.

I

The Issues in This Case Are Governed by Bode et al. v. Barrett, et al.

At the outset it should be noted that the issues in this case with respect to alleged violations of the federal constitution are identical with and are governed by the decision of the Supreme Court of Illinois in *Bode et al* v. *Barrett et al*, 412 Ill. 204, 106 N. E. 2d 521. The *Bode* case is pending on appeal before this Court (Docket No. 187, October Term, 1952) subject to appellees' motion to dismiss the appeal or affirm the judgment of the Supreme Court of Illinois.

In the instant case the trial court by its decree declared the 1951 Act amending the Motor Vehicle Law of Illinois to be unconstitutional and void as violative of Section 8 of Article I and Section 1 of Amendment XIV of the

United States Constitution and as violative of certain provisions of the Illinois Constitution which are of no present concern. A reference to the opinion in the *Bode* case, 412 Ill. 204, 106 N. E. 2d 521, demonstrates that the plaintiffs there specifically assailed the 1951 Act under the identical provisions of the federal constitution and that the Supreme Court of Illinois after a most comprehensive consideration of the questions raised upheld the constitutionality of the Act in its entirety. Furthermore, the Supreme Court of Illinois, in its opinion in the instant case, specifically stated (—— Ill. ——; 106 N. E. 2d 510, 512):

> "Each of the issues as to unconstitutionality presented in the pleadings, briefs and arguments in the instant case was presented to and decided by this Court in its recent decision in the case of *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521, with the exception of the issue raised under Section 13 of Article IV of the Illinois constitution."

The exception mentioned by the Illinois Supreme Court relates to a non-federal issue upon which appellants do not and may not here rely. We urge, therefore, that the appeal herein should be dismissed or, in the alternative, that the judgment of the Supreme Court of Illinois be affirmed for the reasons set forth in the appellees' motion to dismiss or affirm in *Bode*, Docket 187, October Term, 1952.

II

The Claimed Unlawful Burden on Interstate Commerce

A

There is no party before this Court entitled to challenge the Illinois statute upon the ground that it imposes an unlawful burden upon interstate commerce in violation of Section 8 of Article I of the United States Constitution.

The operations of four of the appellants are confined entirely to Illinois (Church, Abst. 86-88; Valentine, Abst. 94-96; Field, Abst. 80-81; Haen, Abst. 71-75). The individual appellants are all residents of Illinois. All but two of the corporate appellants are Illinois corporations and these two are foreign corporations licensed and qualified to do business in Illinois. All appellants, both individual and corporate, maintain places of business in Illinois in connection with which they conduct extensive intrastate operations making use of the Illinois highways. Some of the appellants, in addition to their Illinois intrastate operations, use their trucks in making interstate trips from Illinois into other states. All witnesses testified that by virtue of the Illinois license plates on their trucks they were granted reciprocity in other states into which they made trips and paid no vehicle license fees outside of Illinois.

Thus it will be seen that the appellants here seeking to claim an unconstitutional burden upon their interstate operations are all Illinois residents or concerns having places of business in Illinois from which both intra and interstate operations are conducted. As such they make extensive use of the Illinois highways and are taxed on a parity with all other Illinois truck owners and operators. Those who, in addition to their intrastate operations, choose to engage in interstate trips from Illinois to other states are treated no differently tax-wise from other Illinois truck operators. The license fees which they pay to Illinois give them the full privilege of unlimited use of the Illinois highways for the registration period and, in addition, afford them reciprocity in other states into which they make interstate trips. The license fees paid to Illinois by appellants are neither increased nor diminished by reason of the fact that some of appellants engage in interstate as well as intrastate operations. Those appellants

whose operations are wholly intrastate could commence interstate operations without the payment of additional taxes. Likewise, those appellants who are engaged in interstate operations could, if they chose, cease such operations but would nevertheless be required to pay the Illinois taxes because of the use of the Illinois highways in their intrastate operations.

Since all of the appellants are engaged in extensive intrastate operations in Illinois and are therefore required to pay the Illinois license fees irrespective of whether or not they engage in interstate operations, they are in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

In *Southern Railway Co.* v. *King*, 217 U. S. 524, this Court said (page 534):

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

See also, *Missouri, Kansas and Texas Ry.* v. *Cade*, 233 U. S. 642, 648; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 595-596.

B

But aside from the fact appellants are in no position to urge a violation of the commerce clause, we believe it is obvious that, on the merits, their contentions have been denied by this Court in "decisions so precisely applicable alike in facts and in principle as to apply a closure to de-

bate." *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 289.

It will appear from an examination of the 1951 Act and from the discussion of the same in *Bode* v. *Barrett*, 412 Ill. 204, 106 N. E. 2d 521, that the Act imposes flat annual license fees upon trucks graduated in amounts in accordance with weight brackets or classifications. The tax is imposed for the unlimited privilege of using the Illinois highways during the registration period and the Act requires that the tax be deposited in a special road fund to be used only for retirement of highway bonds, cost of administration of the Act and for highway construction and maintenance purposes.

The tax rates imposed by the 1951 Act constitute an attempt by the State to equalize on a ton-mile basis the motor vehicle and gasoline taxes paid by truck operators with those paid by passenger car operators. The method or formula by which such equalization was accomplished is described at length by the Supreme Court of Illinois in its opinion in the *Bode* case, 412 Ill. 204, 106 N. E. 2d 521, and will not be repeated here.

At the trial of this case the appellants presented the testimony of a Professor Worley who espoused a different theory or formula for calculating motor vehicle license fees and who criticized the ton-mile theory of equalization. At the same time Worley admitted that his theory was highly controversial and that there was a great difference of opinion among highway engineers as to the merits of various theories of taxation. The State introduced evidence to the effect that its theory of equalization upon a ton-mile basis has the support of a respectable body of opinion among experts on the subject.

On the basis of the Worley testimony the appellants contended that the taxes imposed by the 1951 Act were without

rational basis, bore no relationship to the privilege of using the Illinois highways, were excessive and hence constituted an unreasonable burden upon interstate commerce.

The net of the evidence in the record is that two theories of calculating a schedule of motor vehicle license fees have been advanced. It is apparent that such a situation leaves room for legislative judgment and that which theory is to be adopted lies within the province of the legislature and not the courts.

In *Sproles* v. *Binford*, 286 U. S. 374, a Texas statute forbade operation of any motor vehicle carrying a net load of freight exceeding seven thousand pounds. This was attacked as violative of the Commerce Clause and the Fourteenth Amendment of the Constitution. It was contended that the net load limitation as contrasted with a possible gross load limitation, was "opposed to sound engineering opinion" and hence invalid. In overruling this contention this Court said (page 388):

> "... Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

Again, this Court, in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 546, in discussing factors involved in state motor vehicle tax formulas, said:

> "These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision'."

Also, in *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, this Court, in upholding a theatre license ordinance of the City of Chicago, said (pages 69-70):

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy."

This Court has uniformly upheld the validity of state motor vehicle laws imposing flat annual taxes upon vehicle operators. *Carley & Hamilton* v. *Snook*, 281 U. S. 66; *Hicklin* v. *Coney*, 290 U. S. 169; *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285; *Dixie Ohio Express Co.* v. *State*, 306 U. S. 72; *Clark* v. *Poor*, 274 U. S. 554; *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542. In order to be valid such tax laws need not be framed on the basis of a mileage tax. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542; *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285. As to interstate carriers such laws are valid provided the amount of such taxes is not in excess of fair compensation for the privilege of using the State's roads and highways. *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 547. It is clear that the phrase "fair compensation for the privilege of using the highways of the State" means that privilege which is afforded by the tax and not the amount of mileage an individual operator may find it convenient to use. *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 289.

Obviously the taxes imposed by the 1951 Act based as they are upon the equalization of truck taxes with passen-

ger car taxes upon the ton-mile theory have a fair and reasonable basis and are directly related to the privilege of road use. Hence the same, under the uniform holdings of this Court, cannot be said to amount to an unlawful burden upon interstate commerce.

III

The Claim of Confiscation in Violation of the Fourteenth Amendment

In their assignments of error numbers 5 and 6 appellants contend that the taxes imposed by the 1951 Act are so excessive as to amount to "confiscation of a lawful industry" and "confiscation as to whole segments of the truck industry" in violation of Section 1 of Amendment XIV of the Federal Constitution.

In this case fourteen witnesses operating or employed by trucking concerns testified. Some of them testified as to the net profits which had been realized by their concerns in the past and made estimates as to future annual net profits. In a few cases it was testified that the taxes imposed by the 1951 Act would exceed estimated future net profits calculated upon the basis of the then current transportation rates. There is no evidence whatsoever in the record that the witnesses who so testified were representative of or a fair cross section of the many thousands of concerns engaged in the trucking business in Illinois. *Not one witness testified that the increased rates imposed by the 1951 Act would force his concern to go out of business.* Obviously such testimony wholly fails to establish a case of confiscation such as appellants claim.

But appellants' claim of violation of the Fourteenth Amendment by reason of alleged excessiveness of amount of the tax is wholly answered adversely to appellants' contentions by prior decisions of this Court.

In *Magnano Co.* v. *Hamilton*, 292 U. S. 40, this Court sustained a state tax upon butter substitutes against a contention that the same was violative of the Fourteenth Amendment because so large in amount as to confiscate the plaintiff's business. The Court said (page 44):

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. Co.*, 240 U. S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329; *Heiner* v. *Donnan*, 285 U. S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Child Labor Tax Case*, 259 U. S. 20, 37 et seq.; *McCray* v. *United States*, 195 U. S. 27, 60; *Brushaber* v. *Union Pac. R. Co.*, supra, 24-25; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615; *Nichols* v. *Coolidge*, 274 U. S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States*, supra, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka*, 20 Wall. 655, 663-664; *McCray* v. *United States*, supra, 56-58, and authorities cited; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *Child Labor Tax Case*, supra, 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere dis-

guise, under which there was exercise, in reality, another and different power denied by the Federal Constitution to the state."

There is no claim here, nor indeed could it be contended, that the taxes imposed by the 1951 Act fall within the class of "rare and special instances" involving not the exertion of the State's taxing power but the "exertion of a different and forbidden power" mentioned in the above quotation from the *Magnano* case.

Again, the principle of the *Magnano* case was reiterated by this Court in *United States* v. *Sanchez*, 340 U. S. 42, 44, where this Court said:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages or even definitely deters the activities taxed."

IV

The Claimed Violation of the Fourteenth Amendment by Reason of Alleged Vague, Arbitrary and Inconsistent Provisions.

In their assignments of error numbers 9 and 11 appellants claim that the Supreme Court of Illinois erred in refusing to hold the 1951 Act to be violative of the Fourteenth Amendment by reason of certain alleged vague, inconsistent and arbitrary provisions contained in the Act.

In assignment of error numbered 11 specific reference is made to "an indefinite agricultural exclusion" and in appellants' jurisdictional statement reference is made to the agricultural exemption as an "unreasonable classification." The provisions of Section 9 of the 1951 Act relating to exemption from taxation of certain farm and agricultural vehicles and implements have been contained in the Motor Vehicle Law of Illinois in substantially their present form for over twenty years. Such provision was first enacted in 1931, Laws 57th G. A., 1931, p. 789. It has been reenacted

many times since then and occasionally has been amended in minor particulars. There is no evidence whatsoever in the record with reference to the alleged indefiniteness of the exemption provision and, indeed, there could be none for the fact is the exemption provision is clear and definite and has been administered without difficulty for over twenty years. Likewise, the claim that the agricultural exemption is an "unreasonable classification" is foreclosed by prior decisions of this Court and numerous state court decisions upholding the validity of similar exemption provisions in state motor vehicle laws. See, *Aero-Mayflower Transit Co.* v. *Georgia Publ. Serv. Comm.* 295 U. S. 285; *Hicklin* v. *Coney*, 290 U. S. 169; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Ex Parte Iratacable*, 55 Nev. 263, 30 Pac. (2d) 284; *Nance* v. *Harrison*, 176 Ga. 674, 169 S. E. 22; *Anderson* v. *Thomas*, 144 Ore. 572, 26 Pac. (2d) 60; *Collins* v. *State*, 154 Okla. 121, 7 Pac. (2d) 123; *East Tenn. Motor Co.* v. *Carden*, 164 Tenn. 416, 50 S.W. (2d) 230; *Hudson* v. *Stuart*, 166 Miss. 339, 145 So. 611; *State* v. *Public Service Commission*, 207 Wis. 664, 242 N. W. 668. In the court below appellants cited and relied upon *Smith* v. *Cahoon*, 283 U. S. 553, in support of their contention that the agricultural exemption provisions of the Act were violative of the Fourteenth Amendment. But the inapplicability of the *Smith* case to such an agricultural exemption in a motor vehicle law was specifically pointed out by this Court in *Aero-Mayflower Transit Co.* v. *Georgia*, 295 U. S. 285, 291-293.

Appellants' claims of unconstitutionality based upon the lower tax rates provided for buses operating in a municipality or municipalities or within a "close radius thereof"; upon alleged indefiniteness of the phrase "maximum load" and upon other claims of indefiniteness and unreasonable classifications and exemptions were all fully discussed and determined adversely to appellants' contention by the Supreme Court of Illinois in its opinion in *Bode* v. *Barrett*,

412 Ill. 204, 106 N. E. 2d (1921). We believe a mere reading of that opinion establishes beyond doubt the lack of merit in appellants' contentions and, more particularly, that none of said contentions involve a substantial federal question requiring consideration by this Court.

Wherefore, we urge that this Court grant the aforesaid motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Illinois for the reason that no substantial federal question is presented requiring review by this Court.

Respectfully submitted,

IVAN A. ELLIOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Chicago, Illinois;
Attorney for Edward J. Barrett, Secretary of State of the State of Illinois, and Donald Barnes, Commanding Officer of the Second District of the State Highway Police of the State of Illinois, Defendants-Appellees.

JOHN C. FRIEDLAND,
State's Attorney of Kane County, Illinois,
Attorney for Anthony C. Wegman, Sheriff of Kane County, Illinois, Defendant-Appellee.

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois.

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,
Of Counsel.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 24 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

187

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Petition of Appellants for Rehearing on the Merits.

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois.
REID AND OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

PRINTED BY CHICAGO LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a Corporation, et al.,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, et al.,

Appellees.

Petition of Appellants for Rehearing on the Merits.

Petitioners, Co-Ordinated Transport Inc. of Illinois, and the more than fifty other appellants in case #274, present this petition for rehearing on the merits.

Petitioners respectfully state that the majority opinion, dated February 9, 1953, manifests an almost shocking disregard of the facts appearing in the Record, and misconceives the law.

The majority opinion judicially amends the Constitution of the United States without authority, reason or justification. It establishes an unique and unsound principal of law that will eviscerate the Commerce Clause of the Con-

stitution and leave it without force or effect, by requiring no participation in intrastate commerce as a condition to invoking the Commerce Clause by one engaged in interstate commerce.

I.

The factual basis for the majority opinion is that each of the petitioners, some of whom the majority concedes to be interstate carriers, does intrastate business as well (p. 2, majority opinion). Rehearing should be granted to afford petitioners an opportunity to point out to the court from the Record that this factual assumption is incorrect.

Admittedly, the Record shows that each of the petitioners travels some miles over Illinois highways. However, Illinois mileage is not necessarily indicative, let alone conclusive, of an intrastate operation. Yet the majority so assumes. Interstate hauling between Illinois and another state necessarily includes Illinois mileage. Short haul operators may operate entirely within Illinois and may hold no intrastate permit.

Nothing in the Record indicates that certain of these appellants conduct any business other than interstate.

For example, petitioner Cecil Kain owns one truck (R. 69), which is a tractor (R. 70). Kain leases a trailer from Carson and Son, whose home office is in Clinton, Iowa. Then Kain leases both units back to Carson and Son. Carson and Son operate under the Interstate Commerce Commission rate control. Although Kain travels fifty-three thousand (53,000) of fifty-five thousand (55,000) miles in Illinois, all of this mileage is in interstate commerce as a lessee to Carson and Son, which is an Iowa concern. There is not one word in the Record (R. 69-70) that Kain does any intrastate carrying. The contrary affirmatively appears. Kain is engaged entirely in interstate commerce.

Russell Young is a petitioner who leases thirty-eight trucks to others (R. 65). In reality he is a broker (R. 67). This court cannot assume because Young's trucks, leased to others, operated 200,000 miles in Illinois and more than ten times that mileage outside (R. 66), that therefore Young was engaged in intrastate commerce. The mere fact that there is mileage in Illinois is not indicative that this mileage is in intrastate commerce. Interstate commerce does not stop at the state line.

The court stated (P. 2, majority opinion):

> "But it is also true that each of the interstate carriers does an intrastate business as well."

This statement is erroneous and unsupported by the Record. We submit that on this basis alone the court should grant a rehearing.

II.

The majority opinion incorrectly states (P. 2):

> "No effort is made to show that in that way or in some other manner the tax is increased by reason of the interstate operations of any appellant."

The Record clearly shows that the tax on petitioners who are in interstate commerce *is* increased by reason of their interstate operations.

As Mr. Justice Frankfurter pointed out in the minority opinion (P. 1):

> "It has been suggested in a cognate situation, though one involving a comparatively trifling exaction, that interstate commerce is unconstitutionally burdened solely because the taxpayer's interstate business increases the number of trucks on which the tax is levied and hence the total amount due from him."

Here the tax is not trifling. It is huge.

And here the Record affirmatively shows in a great number of instances that the number of trucks is increased by the interstate business of the petitioners, and the tax on these trucks burdens interstate commerce.

For example, petitioner, Co-Ordinated Transport has forty (40) tractors, ninety (90) semi-trailers, and twenty-three (23) straight trucks (R. 38). Its operations cover ten thousand (10,000) miles in Illinois and one hundred twenty-five thousand (125,000) miles outside Illinois each month (R. 41). Co-Ordinated's far flung interstate operations are detailed on page 49 of the Record. Only three per cent (3%) of Co-Ordinated's business is local transportation. Ninety-seven (97%) per cent is in interstate commerce (R. 46). The vast majority of Co-Ordinated's units were utilized solely in interstate commerce. The tax on those units so engaged would not be payable at all but for Co-Ordinated's participation in interstate commerce, and to that extent the tax on that taxpayer was increased and interstate commerce has been burdened.

Petitioner Wagner Transfer Company does seventy-five per cent (75%) of its business in interstate commerce (R. 55). Moreover, the business done in interstate commerce is solely as a contract carrier, while the intrastate business of Wagner Transfer Company is entirely as a common carrier. Thus in the case of Wagner Transfer Company its business carried on in interstate commerce is entirely different from that carried on in intrastate commerce. Again, the number of units which are used in the contract interstate business must of necessity be greater than the number that would be required to carry on the intrastate common carrier business alone.

Petitioner Alton Box Board Company furnishes another example where additional trucks are needed solely for inter-

state commerce. A fleet of trucks is kept exclusively in Indiana at LaFayette (R. 62).

The court's assumption that the interstate operations of petitioners do not increase their tax burden is clearly without warrant in the Record.

Rehearing is urgently demanded to correct the court's factual mistake.

III.

The majority opinion held that because petitioners do intrastate business they are not entitled to the protection of the Commerce Clause of the United States Constitution for their interstate operations.

The factual basis of this holding is not supported by this Record as demonstrated above (I. and II. *supra*).

This decision is a departure from many past decisions of this court. It amounts to an amendment of the Commerce Clause unsupported by logic or authority.

The court's decision is tantamount to restricting the protection of the Commerce Clause to those engaged in interstate commerce only so long as they are not also engaged in intrastate commerce.

It is well settled that it is the interstate commerce which is protected by the Commerce Clause. That a person or a corporation engaged in interstate commerce may also be engaged in intrastate commerce does not deprive him of the protection of the Commerce Clause.

In *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U.S. 90, the State of Washington laid a gross receipts tax on appellant's business as a stevedoring company. This court found that part of appellant's business was in intrastate commerce and part was in interstate

commerce. The situation was exactly the same as in the case at bar. The Supreme Court of Washington had affirmed a judgment dismissing a suit to enjoin the collection of the tax. On appeal this court modified the decree as being erroneous to the extent that it upheld the tax on that part of the Appellant's business which was interstate commerce. The court stated (p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. . . .
>
> "The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state."

The *Puget Sound* case is typical of the host of decisions to which Mr. Justice Frankfurter referred in the dissenting opinion. The *Puget Sound* case was cited on page 4 of appellant's reply brief. The majority opinion made no mention of this decision and could not and did not distinguish it.

Nor did the court mention or distinguish *Freeman* v. *Hewitt*, 329 U.S. 249, reh. den. 329 U.S. 832, cited at pp. 5 and 6 of appellant's reply brief.

In the *Freeman* case the taxpayer was domiciled in Indiana. The securities had their situs in Indiana. The sale upon which the Indiana tax was imposed was in interstate commerce. In holding that the tax was unconstitutional and in disposing of the contention that because Indiana transactions were likewise taxed at the same rate

as interstate transactions the tax was in all respects proper, this Court stated at page 273:

> "It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things."

The *Freeman* case is a complete answer to the Court's holding that because the appellants are engaged in intrastate operations they are therefore in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations.

The court's decision that participation in intrastate commerce robs a petitioner also engaged in interstate commerce of the protection of the Commerce Clause not only

overthrows the many decisions of this court but has the far reaching and vital effect of making any interstate business which incidentally might have an intrastate aspect subject to unlimited tax or regulation by the state wherein it does intrastate business. The interstate business of a railroad which handles local passengers as well might thus be burdened by many states. Gross receipts of chain store operators might be taxed by each state wherein there is an intrastate operation. The utimate effect of this decision is far reaching and dangerous. Plainly its implications were not considered by the majority of this court.

The cases cited by Justices Frankfurter and Jackson on page 3 of the dissenting opinion, *Leloup* v. *Port of Mobile*, 127 U. S. 640, *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, and *Pullman Co.* v. *Kansas*, 216 U.S. 56, and "a hundred odd cases since" *all entertained the question of whether interstate commerce was burdened and decided that question on its merits.* In all those cases the party complaining of the regulation, tax, or impost was engaged in both intrastate and interstate commerce. The majority opinion overlooked these well reasoned cases of long-standing importance.

The majority opinion likewise overlooked the important case of *Sprout* v. *South Bend*, 277 U.S. 163 cited on pp. 16, 36 and 39 of appellants' (petitioners') brief.

In the *Sprout* case as here the court (p. 168) discussed at length the operations of Sprout and concluded that Sprout was engaged in both inter and intra state commerce. This court also stated that the requirements of the South Bend ordinance in question made no distinction between buses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce (p. 167). The fact situation there is thus exactly as it is in the case at bar.

This court in the *Sprout* case concluded that the imposition of the license fee upon Sprout was invalid.

But the important point is that in *Sprout*, despite Sprout's participation in intrastate commerce, the court decided the question of whether or not interstate commerce was burdened *on its merits*. Participation in intrastate commerce did not deprive Sprout of the protection of the Commerce Clause in so far as his interstate business was concerned; neither should the participation of any of these petitioners in intrastate commerce deprive him of the protection which the Commerce Clause affords.

The court overlooked the *Sprout* case, the *Freeman* case, the *Puget Sound* case, and "a hundred-odd" others, and a rehearing should be granted.

IV.

The lone case cited by the majority opinion to support the proposition that ". . . appellants have failed to carry the burden of showing that the tax deprives them of rights which the Commerce Clause protects. *Cf. Southern R. Co. v. King*, 217 U.S. 524, 534." (majority opinion P. 2) fails entirely to support that proposition. In *Southern R. Co.* this court merely held that where one had not properly pleaded his engagement in interstate commerce a judgment against him would be affirmed over the objection that a statute for the violation of which the judgment was rendered violated the Commerce Clause. In *Southern R. Co.* this court relied on the Record before it.

To make a proper disposition of the case at bar, this court is similarly bound to rely on the Record. Here the Record demonstrates without question that petitioners have pleaded and proved *without contradiction* that they are engaged in interstate commerce. Indeed the appellees

admitted petitioners were so engaged in interstate commerce (R. 20 (Answer to Paragraph 1 of Complaint)).

If the *Southern R. Co.* case is authority for the proposition that the court will not hear a case on the merits where engagement in interstate commerce is not pleaded, it is also authority for the converse proposition that where, as here, engagement in interstate commerce is pleaded, proved and admitted that the court must decide the matter on its merits.

The majority by its very citation ("Cf.") acknowledges that the *Southern R. Co.* case does not support its decision. One case and one alone is cited. That case does not support the decision.

In the light of the *Southern Railway* case and its misapplication by this court, the court's admission (majority opinion P. 2) that they do not stop to analyze the evidence tendered by appellants (petitioners here), for they do not reach the issue in this case, is itself decisive of error and of a misapplication of the law.

Rehearing is respectfully demanded in order that the court can consider the case on its merits.

V.

The court on page 2 of the majority opinion states:

> "Clearly it is within the police power of Illinois to exact such a tax at least from intrastate operators."

The sole authority for this proposition cited by the court is the case of *Hendrick* v. *Maryland*, 235 U.S. 610.

The court by the use of the words "such a tax" clearly begs the question presented by these petitioners to the court. In the *Hendrick* case which the court cited, the tax involved ranged in amount from $6.00 to $18.00 per year, depending upon the horse power of the vehicle licensed.

The Illinois statute which is here before the court provides in Section 9 thereof that owners of vehicles shall pay for each calendar year for the use of public highways of this state "a *license fee* of $5.00 for each such vehicle" and later in the same section it is provided that each owner of a motor vehicle shall pay for each calendar year for the use of the public highways "a *tax* at the following rate * * *." (Italics supplied.)

Obviously, the legislature of the State of Illinois had in mind two separate exactions. The former, a license fee, is the same sort of imposition as the court considered in the *Hendrick* case. The petitioners in the case at bar have nowhere complained of that exaction. However, the additional imposition is a tax for the production of revenue and ranges in amounts up to $1588.00 for one year over and above and in addition to the license fee.

The Supreme Court of Illinois, in its decision in this case, recognized that the Illinois Motor Vehicle Act was "both a revenue and police power measure." (412 Ill. 321 at p. 329). This court in the *Hendrick* case specifically pointed out that the statute involved was not a revenue measure and avoided discussion of the act on that basis. Moreover, the court in the *Hendrick* case stated "the unreasonableness of the state's action is always subject to inquiry insofar as it affects interstate commerce." Further the court in the *Hendrick* case, though recognizing that a state may exact compensation for facilities which it provides, specifically states that the action of the state must be treated as correct unless the contrary is made to appear. It was pointed out that in the *Hendrick* case there was no evidence concerning the value of the facilities supplied by the state, the cost of maintaining them or the fairness of methods adopted for collection of charges imposed.

We point out to the court that the entire Record made by the petitioners in this case in the trial court was directed to the proposition that the *tax* of $1588.00 (as opposed to the *fee* of $5.00) bore no relationship to the value of privilege granted. Therefore, on the authority of the *Hendrick* case this court should have examined the evidence and decided the issue in the case and committed error by failing so to do.

The *Hendrick* case not only fails to support the proposition that interstate commerce may be thus burdened but also fails to substantiate the proposition that even intrastate commerce may be so burdened when the imposition bears no such reasonable relationship to the value of the privilege. Even aside from the fact that the *Hendrick* case was dealing with a police power imposition as opposed to a tax for revenue purposes, we submit that the *Hendrick* case, limited to a maximum fee of $18.00 a year, concerning which the court said at p. 624, "and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable," is not authority for the proposition that an exaction of $1588.00 a year is not arbitrary or unreasonable.

We suggest that the court's use of the *Hendrick* case indicates that the court made a fundamental misapplication of the law and by reason thereof we submit that there should be a rehearing of this cause on its merits, in order for petitioners to present the controlling cases.

VI.

The holding of the court that the objections of these petitioners under the Due Process Clause of the 14th Amendment are without substance is, we submit, erroneous. It is unsupported by any reference to the Record in this case.

The uncontradicted evidence in the Record before the court demonstrates conclusively that most of the truckers involved will be obliged to pay taxes in excess of their net incomes. Moreover, the evidence demonstrates, again without contradiction, that these deficits cannot be recouped by increasing rates charged to customers. This situation is confiscation. There is not a scintilla of contradictory proof in the Record before the court.

The power to confiscate is indeed the exercise of "a different and a forbidden power" to prevent which the Due Process Clause of the 14th Amendment was designed. This court has never held that a useful, harmless, and legitimate business can thus be destroyed. The court has failed to observe the obvious distinction between businesses which might in some respect harm the public and which thus could and should be prohibited under the police power, and those legitimate businesses the right to pursue which is the very life, liberty and pursuit of happiness that the Constitution guarantees.

Rehearing is urgently requested in order that petitioners may inform the court of their position on this issue.

VII.

Petitioners have pointed out above that the failure by this court to decide this case on its merits is unjustified by the facts in the Record and is contrary to the law and established decisions of this court.

Petitioners further contend that this court should rehear the case on its merits, not only because the facts of Record and long established precedent demand such a decision, but also because of the widespread importance of the question here presented to the court. Rehearing is urgently requested in order to apprise the court of the importance of the court's failure to rule on the merits.

The transportation of passengers and freight by motor vehicle in the United States is of comparatively recent origin. With changes in the economy, the law is in a process of development. The rights of the several states to regulate and tax this new form of commerce have been established but without final clarity. The rights of truck owners and operators are almost undefined. In the few cases involving tax or regulation of motor vehicle transportation decided by this court, the nature of the tax or regulation involved was much narrower in scope and the amount of the tax imposed was minuscule in comparison with the broad ambit of and tremendous burden imposed by the Act here in question.

The nature and amount of the tax levied by the Illinois legislature is a far cry from the $6.00 to $18.00 impost passed upon in *Hendriek* v. *Maryland*. That measure was solely an exercise of the police power. In the case at bar the police and revenue powers have both been used to impose a maximum tax of $1593.00 for one truck for one year. The tax here in question is designed to increase the revenue of the State of Illinois by $28,000,000.00 per year.

A decision on the merits is of obvious importance to the commerce among the several states. The group being taxed is the second largest employing group in this nation. It renders services to every city, village and town and to every factory and farm. Certainly such a group is entitled to know whether this monstrous tax is or is not constitutional.

The legislatures of other states are likewise entitled to know the answer to this question and to know what, if any, limitations are to be imposed upon their powers. The State of Illinois has a vital and obvious concern in a disposition of this case upon its merits.

This court, in holding that one who engages in intrastate commerce loses the protection of the commerce clause even though he also engages in interstate commerce, has practically invited a suit to test the validity of the act by one solely engaged in interstate commerce. Such multiplicity of litigation cannot recommend itself to this court, particularly where it is unnecessary, in view of the fact that the court can decide the question upon this Record. Such additional litigation incited by this court's failure to decide this case upon its merits, would of necessity deny to the State of Illinois the orderly and prompt collection of revenue, which, if the State's position in this case is correct, should not thus be suspended.

Finally a decision on the merits is of vital importance to the truckers of Illinois. The uncontradicted evidence in the record establishes beyond doubt that the tax is confiscatory as to them. Their livelihood, as well as the economy of the entire State, is in jeopardy. A decision upon the merits is the only way in which the situation can be reduced to certainty for all concerned.

The question that this court must decide in a decision on the merits simply is "how much is too much?"

It is respectfully submitted that the facts of the case, established law and the importance of the question to the state, the nation and to the large body of individuals interested demands that this court decide the case upon the merits. A rehearing is accordingly requested.

CONCLUSION.

Petitioners respectfully state that this court in its unprecedented, terse and undocumented decision has not fully and completely considered the grounds for or the effect of its decision either with reference to the case at bar or with

reference to the Commerce Clause of the Constitution of the United States. The court has judicially amended that Constitution without justification or authority, and has excluded from the protection of the Commerce Clause of the Constitution hundreds of thousands of individuals whose efforts are the life blood of the Commerce itself, not only in the trucking industry, but in other important aspects of that commerce. The court's decision is likewise of significance to the several states and to appellees herein.

The court has ignored the Record by its own admission and has ignored its own past and long established holdings to reach an unconscionable result.

For the reasons above set forth, petitioners therefor respectfully pray that a rehearing be granted in the above entitled case.

Respectfully submitted,

SAM ALSCHULER,
FRANK R. REID, JR.,
RALPH C. PUTNAM, JR.,
ROBERT B. HUPP,
WILLIAM C. MURPHY,
Attorneys for Appellants.

PUTNAM, JOHNSON & ALSCHULER,
32 Water Street,
Aurora, Illinois,

REID and OCHSENSCHLAGER,
6 Downer Place,
Aurora, Illinois,
Of Counsel.

Certificate of Counsel.

I, Sam Alschuler, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

SAM ALSCHULER,
Counsel for Petitioner.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FEB 27 1933

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a corporation, *et al.*,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

RESPONSE OF APPELLEES TO APPELLANTS' PETITION FOR REHEARING.

LATHAM CASTLE,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 274

CO-ORDINATED TRANSPORT, INC. OF ILLINOIS, a corporation, *et al.*,

Appellants,

vs.

EDWARD J. BARRETT as Secretary of State of the State of Illinois, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

RESPONSE OF APPELLEES TO APPELLANTS' PETITION FOR REHEARING.

We believe the only point raised in Appellants' Petition for Rehearing which merits a response is the contention (Petition for Rehearing, Point I) that the record in this case does not support the statement at page 2 of the majority opinion to the effect "that each of the interstate carriers does an intrastate business as well". The fact is that on the record in this cause the Court could have reached no other conclusion.

From beginning to end this case has been tried upon the theory that all plaintiffs are engaged in intrastate operations and that some, in addition, engage in interstate trucking. In the Appellees' brief in this Court we urged this

fact in support of our argument that appellants had no standing to challenge the tax under the Commerce Clause (Brief of Appellees, 11-14). In their reply brief appellants did not deny the correctness of our factual statement but tacitly admitted the same to be true as follows (Appellants' Reply Brief, 6):

> "The *Freeman* case is a complete answer to appellees' contention that because the appellants are engaged in intrastate operations they are therefore in no position to urge that the Illinois taxes amount to an unlawful burden upon their interstate operations."

The Court will recall that at the oral argument in this cause counsel for the State, in response to a question from the bench, stated that all plaintiffs who engaged in interstate operations were also engaged in intrastate operations. Counsel for appellants did not challenge the statement.

Now, for the first time in the entire course of this litigation, appellants attempt to show that "certain" of the plaintiffs are engaged wholly in interstate activities. They support their argument by singling out only two of the fifty-four plaintiffs—namely, Cecil Kain and Russell Young. An examination of the record discloses the utter lack of factual support for appellants' contention.

The verified complaint in this cause contains the following allegations with respect to plaintiff Kain (R. 3):

> "The plaintiff, Cecil Kain, is a resident of Kane County, Illinois, and the owner of one tractor, a vehicle of the Second Division, as defined in sections 1 and 2 of the Motor Vehicle Law of the State of Illinois. Said plaintiff uses said tractor for the transportation of property *in intrastate commerce* within the State of Illinois and in interstate commerce between the State of Illinois and other States, and in so doing operates upon the highways in Kane County, Illinois, and elsewhere in Illinois and in other states." (Emphasis supplied.)

This allegation was admitted by the answer filed on behalf of the appellees (R. 20). The testimony with respect to Kain's operations was exceedingly brief (R. 69-70) and it does not support appellants' assertion (Petition for Rehearing, page 2) that all of the mileage traveled in Illinois was in the course of interstate commerce. Only by making factual assumptions not found in the testimony can it be concluded that Kain's operations were wholly interstate. In any event, appellants' present contentions with respect to this plaintiff are directly contrary to the facts as alleged in their sworn complaint.

On December 10, 1951 the trial court entered an order permitting the joinder of certain additional parties plaintiff and permitting the complaint previously filed to stand as the complaint of the additional plaintiffs (R. 33). Among the plaintiffs so added was Russell Young. The motion for leave to join recited (R. 30-31):

> "Now come . . . Russell M. Young; . . . all residents of the State of Illinois and doing business in said State, all of whom are engaged as carriers by motor vehicle in the transportation of property *in intrastate* commerce within the State of Illinois and interstate commerce between the State of Illinois and other states; . . ." (Emphasis supplied).

The testimony of Young, like that of Kain, was brief (R. 65-68). We submit that a fair reading of Young's testimony supports the allegations of his motion for leave to join as a party plaintiff for he testified that "fourteen to sixteen trucks operate solely within the City of Chicago" (R. 66).

All other matters raised in the Petition for Rehearing were fully briefed and argued in the course of the original hearing of this cause and, we submit, require no further comment. We urge, therefore, that appellants' petition

raises no issues requiring additional consideration by the Court and that accordingly the Petition for Rehearing should be denied.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of State of Illinois,
160 North La Salle Street,
Chicago, Illinois,

JOHN T. CHADWELL,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

FRANK M. PFEIFER,
Special Assistant Attorney General,
Security Building,
Springfield, Illinois,

RICHARD M. KECK,
Special Assistant Attorney General,
135 South La Salle Street,
Chicago, Illinois,

Attorneys for Appellees.